2010

Iris M. Spafford, and Earl S. Spafford v. Granite Credit Union, a Utah Corporation : Unknown

Utah Court of Appeals

Earl S. Spafford; Iris M. Spafford; Attorneys for Appellants.
Anthony C. Kaye; Mathew L. Moncur; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

IRIS M. SPAFFORD, and
EARL S. SPAFFORD

*

Plaintiffs/Appellants,

vs.

*

Case No. 20100086-CA

GRANITE CREDIT UNION,
A Utah Corporation,

*

Defendant/Appellee.

APPELLANT'S EXHIBITS

APPEAL FROM A DECISION AND ORDER DENYING MOTION TO RECUSE OR OTHERWISE DISQUALIFY THE TRIAL COURT AND GRANTING MOTION FOR SUMMARY JUDGMENT, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE TYRONE MEDLEY PRESIDING.

ANTHONY C. KAYE
MATHEW L. MONCUR
Ballard Spahr
201 S. Main Street, Suite 800
Salt Lake City, UT 84111
Attorneys for Defendant/Appellee

IRIS M. SPAFFORD
EARL S. SPAFFORD
6026 Village III Road
Salt Lake City, UT 84121
Tele: (801) 278-5909
Attorneys Pro Se for
Plaintiffs/Appellants

IN THE UTAH COURT OF APPEALS

IRIS M. SPAFFORD, and
EARL S. SPAFFORD

Plaintiffs/Appellants,

vs.

GRANITE CREDIT UNION,
A Utah Corporation,

Defendant/Appellee.

Case No. 20100086-CA

APPELLANT'S EXHIBITS

APPEAL FROM A DECISION AND ORDER DENYING MOTION TO RECUSE OR OTHERWISE DISQUALIFY THE TRIAL COURT AND GRANTING MOTION FOR SUMMARY JUDGMENT, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE TYRONE MEDLEY PRESIDING.

ANTHONY C. KAYE
MATHEW L. MONCUR
Ballard Spahr
201 S. Main Street, Suite 800
Salt Lake City, UT 84111
Attorneys for Defendant/Appellee

IRIS M. SPAFFORD
EARL S. SPAFFORD
6026 Village III Road
Salt Lake City, UT 84121
Tele: (801) 278-5909
Attorneys Pro Se for
Plaintiffs/Appellants

Tab 1

Earl S. Spafford, Plaintiff
In Propria Persona
6026 Village III Road
Murray, UT 84121
Telephone: (801) 699-8474
Telephone: (801) 278-5909

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

IRIS M. SPAFFORD, and EARL S. SPAFFORD,	}	
Plaintiffs,		
vs.	}	**AFFIDAVIT**
GRANITE CREDIT UNION, A Utah Corporation.	}	Case No. 070911059
Defendant.		**Judge Tyrone Medley**

EARL S. SPAFFORD, having been first duly SWORN on OATH deposes and says:

1. He is a party Plaintiff in this action, over the age of 18 and was an eye witness to the tragic fall at the Granite Credit Union on April 4, 2005. I have personal knowledge of all facts and circumstances herein.

2. At the time of Iris' fall it was raining and traffic encircled the building to use the drive in window on the opposite side. I had my eye squarely upon her as she got out of her car and attempted to navigate the step leading from the parking lot. To my knowledge no one else saw her fall. Nonetheless, a crowd soon gathered and offered help. After the ambulance arrived I saw the crowd disburse and I remember three individuals in separate cars step down from the step where Iris fell to go to their separate parked cars.
3. I was sitting in my car listening to the radio and watching Iris while Iris did our banking. I was properly parked in a marked parking stall located at the South East corner of building. The single handicapped parking was occupied. I walked with a cane, and was thus permitted to park in a handicapped stall. It is shocking to me that there was only one handicapped parking available to the patrons. We sometime bank at the main office of the Credit Union, and it has adequate parking for the handicapped. Iris took the shortest possible route to the Credit Union because the step was unmarked and traffic around the perimeter was heavy. I made several observations that are apparent and certainly within the knowledge and experience of the average lay man.
4. I say and have since seen that the Credit Union is very busy, with customers coming and going as the leave and return to their parked cars. I have taken the opportunity to return often to the Credit Union to view the scene of her fall. The sidewalk on the East side of the building is raised well above the parking lot and to a lesser degree to the West. The curb is tapered aggressively toward the North to allow the parking lot and sidewalk to attempt to drain into a storm sewer. The storm drain was located only a few feet and in

Direct line from the step where she fell. Her head was in an accumulation of water from the rain and inlet pipe from the roof discharging into the parking lot.

5. The asphalt sloped away from the step where she fell. It, like the step was in a state of disrepair. The entire outside area obviously was badly maintained. The paint on the only ramp accessible to the public and the ramp for employees at the top of which was a locked door marked "Employees Only".

6. Both ramps were inadequately painted and the paint, such as it was, was deteriorated and worn away. Even the ramps were in a state of disrepair. The entire exterior of the facility including the entire step, both to the North and to the West was deteriorating with the edge of the step broken and loose, showing an obvious lack of maintenance and design. Even the concrete was displaced on the step.

7. The step was unmarked with a warning of any kind painted on the leading edge of the step. Nor was it painted red or yellow, or at all, to warn patrons of the intrinsic dangerous condition of the step. A handrail blocking egress or ingress was absent.

8. I observed traffic in the parking lot either going into the Credit Union or to the drive in facility. Thus, Iris, like other customers whom I have observed from time to time took the safest and most direct route to do our or their banking. To do otherwise, because it was raining and dangerous, because of traffic, to traverse behind parked cars into a path of moving vehicles in order to enter the building would be suicide. These observations were open and obvious and certainly within the common experience of the average layman. I have also looked at the appended pictures, which are incorporated by reference in this Affidavit, and these have refreshed my recollection. These pictures were taken recently by Mr. Clarence Kemp, a licensed civil engineer. Having seen these pictures I then went to Granite Credit Union in order to verify what the pictures depict. I found that the pictures accurately portray the step and parking lot when and where Iris fell.

9. On September 3, 2009 I took occasion to take a measuring tape and measure the heights of the step where Iris fell and the step to the far West and far North. I found the step to the North corner of the building to be 5 ¾ inches from the parking lot to the sidewalk. Due to the deterioration of the leading edge of the step it was closer to 5 ¼ inches. I found the step to the East corner of the building to be 5 ½ inches high. The step where Iris fell was 7 ¾ inches high, badly deteriorated from lack of maintenance on the leading edge. The asphalt was sloped from the step to the storm sewer in a dramatic fashion. The water from the inlet pipe was sheeting where Iris' path took her. This slope, also showing breaks in the surface from obvious lack of maintenance, together with the broken and loose edge of the step caused Iris to fall.

10. Since Iris' fall I have developed a practice of observing other Credit Unions And several banks, grocery stores, box stores, department stores, and even convenience stores, and they all have adequate marked stalls for the handicapped and painted lines where customers are alerted to a dangerous condition. The Credit Union had insufficient (only one) such parking stalls and no painted steps whatsoever.

11. Iris was prior to the accident a vibrant, physically strong (despite her small frame). She exercised regularly. She was in the swimming pool weekly while the pool was open. She romped with her grandchildren. She taught classes in Church. She was even known to drive a golf ball or bowl a few games. She never walked with a cane, nor needed one. She had no history of fractures.

12. I have lived and re-lived that April day and the days to follow. I have visited and re-

visited the Credit Union many times to be sure of what I have seen. There is no doubt that Granite Credit Union was negligent in it's maintenance of the obvious paths of ingress and egress to the building by invited customers. It is evident to me that the steps had not been maintained for many years, or as long as the Credit Union occupied the building. Nor has the parking area around the storm drain be maintained or re-configured. And I found no evidence that warning words, a guard rail, or any paint on the step had been installed. It is obvious to me that speaking as a layman, drawing from my common experience and knowledge personnel, agents or management of the Credit Union either knew or should have known of the permanent, dangerous and negligence condition leading to Iris' injuries.

Earl S. Spafford

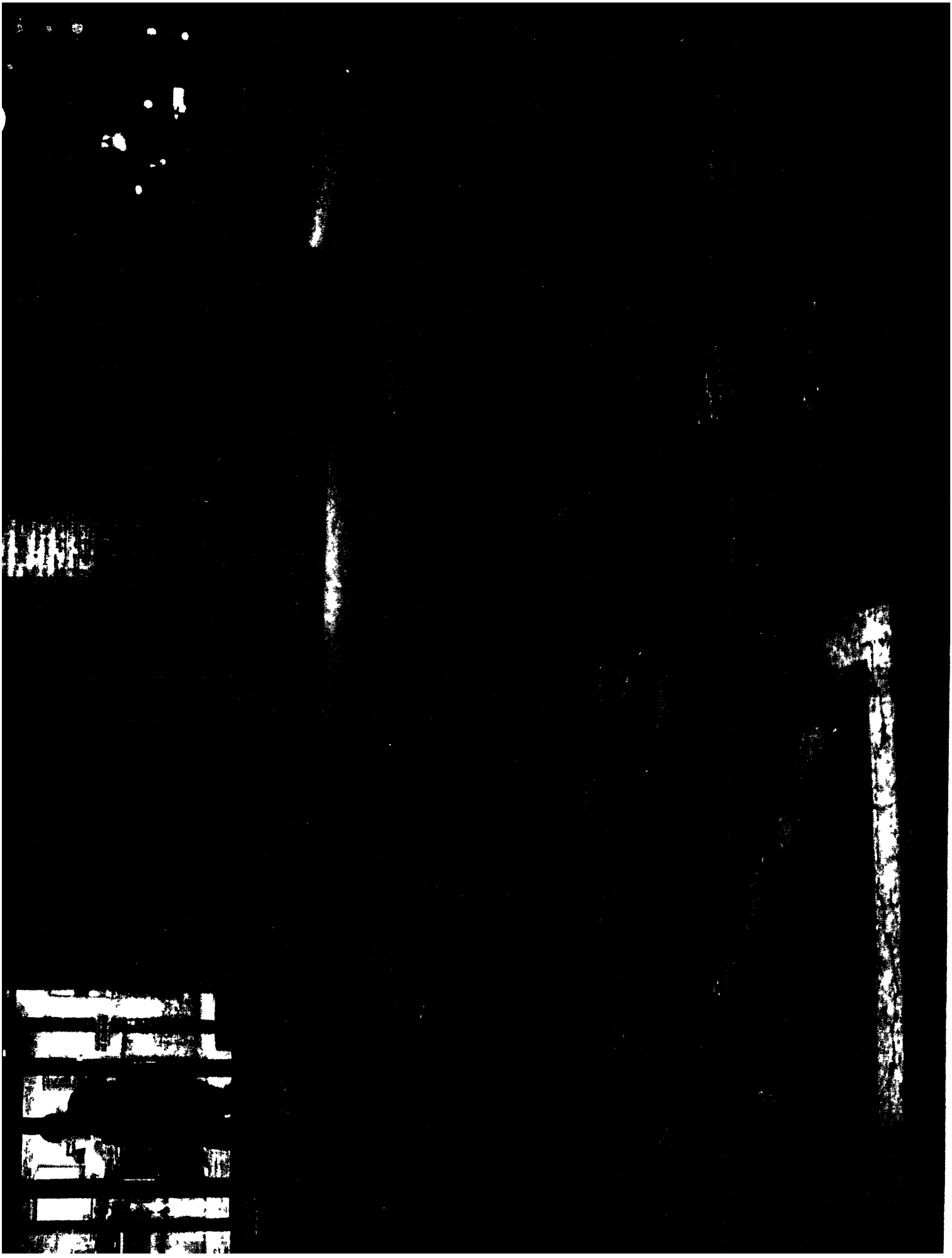
Earl S. Spafford, In Person Propria

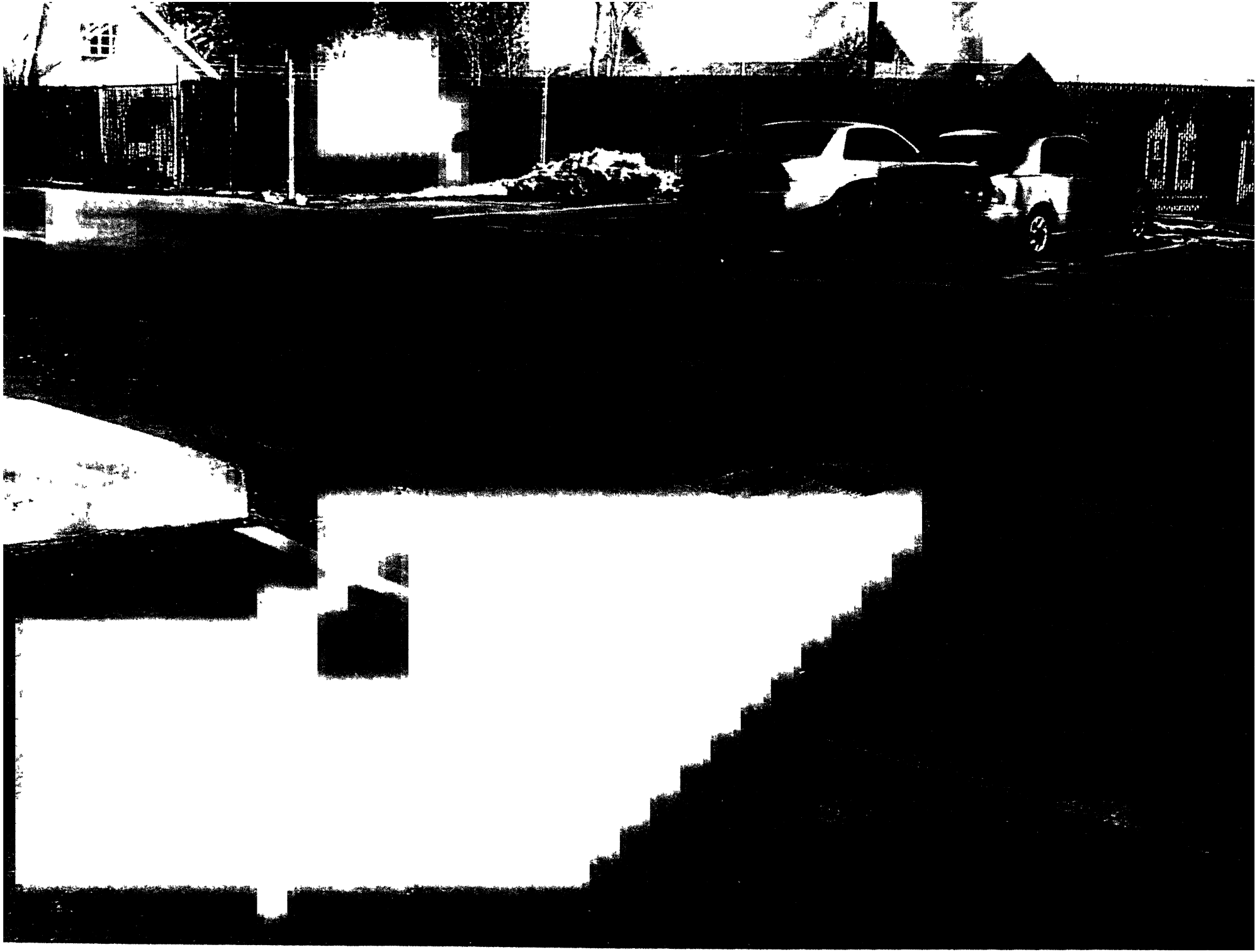
STATE OF UTAH }
} **ss**
COUNTY OF SALT LAKE }

On the 13 day of October, 2009 personally appeared before me, a **NOTARY PUBLIC**, the signers of the above and foregoing Affidavit, and having Been first duly **SWORN on OATH** declared that he signed said Affidavit, and the said Affidavit was true.

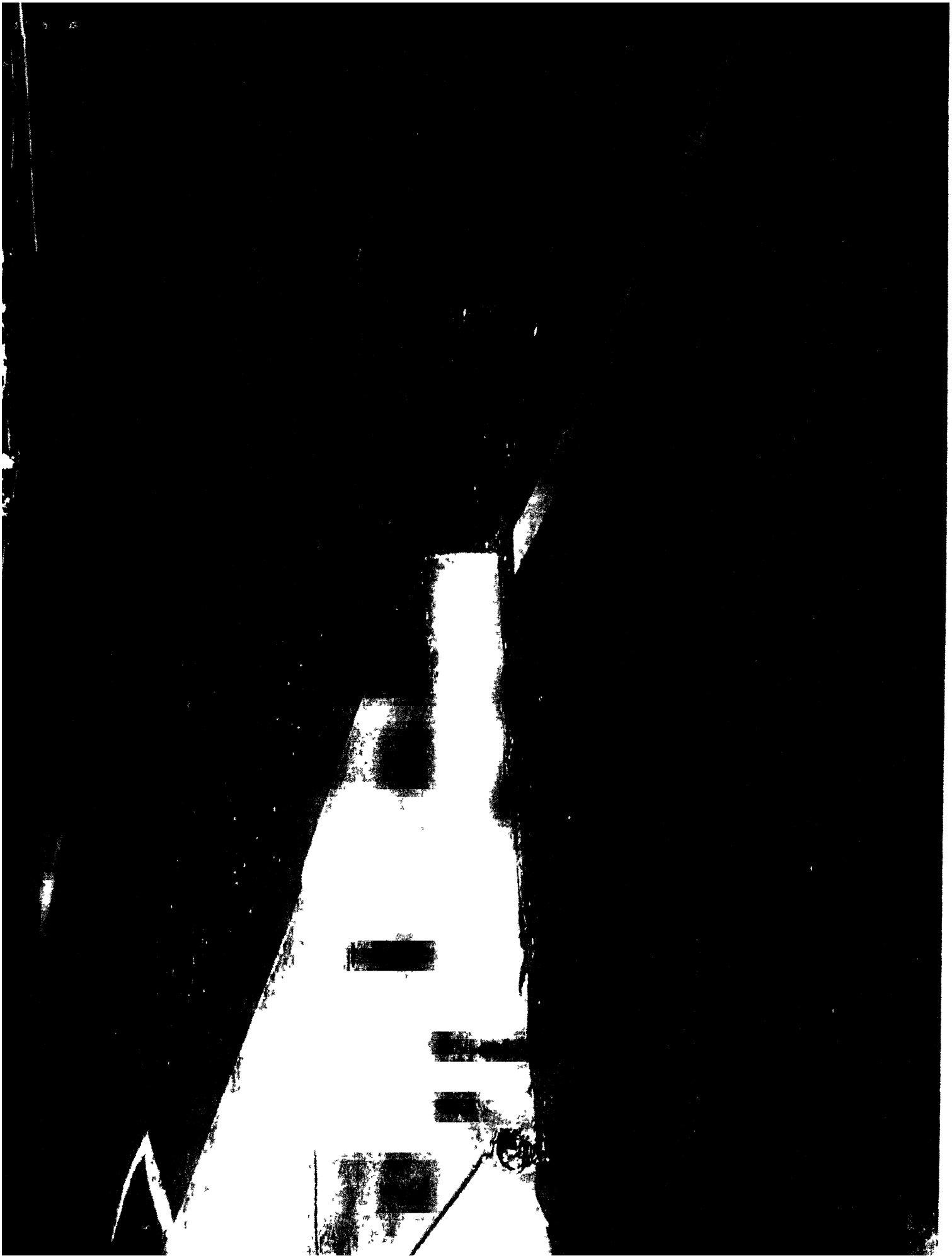
JARED HASLAM
Notary Public
State of Utah
Comm. No. 576052
My Comm. Expires Oct 9, 2012

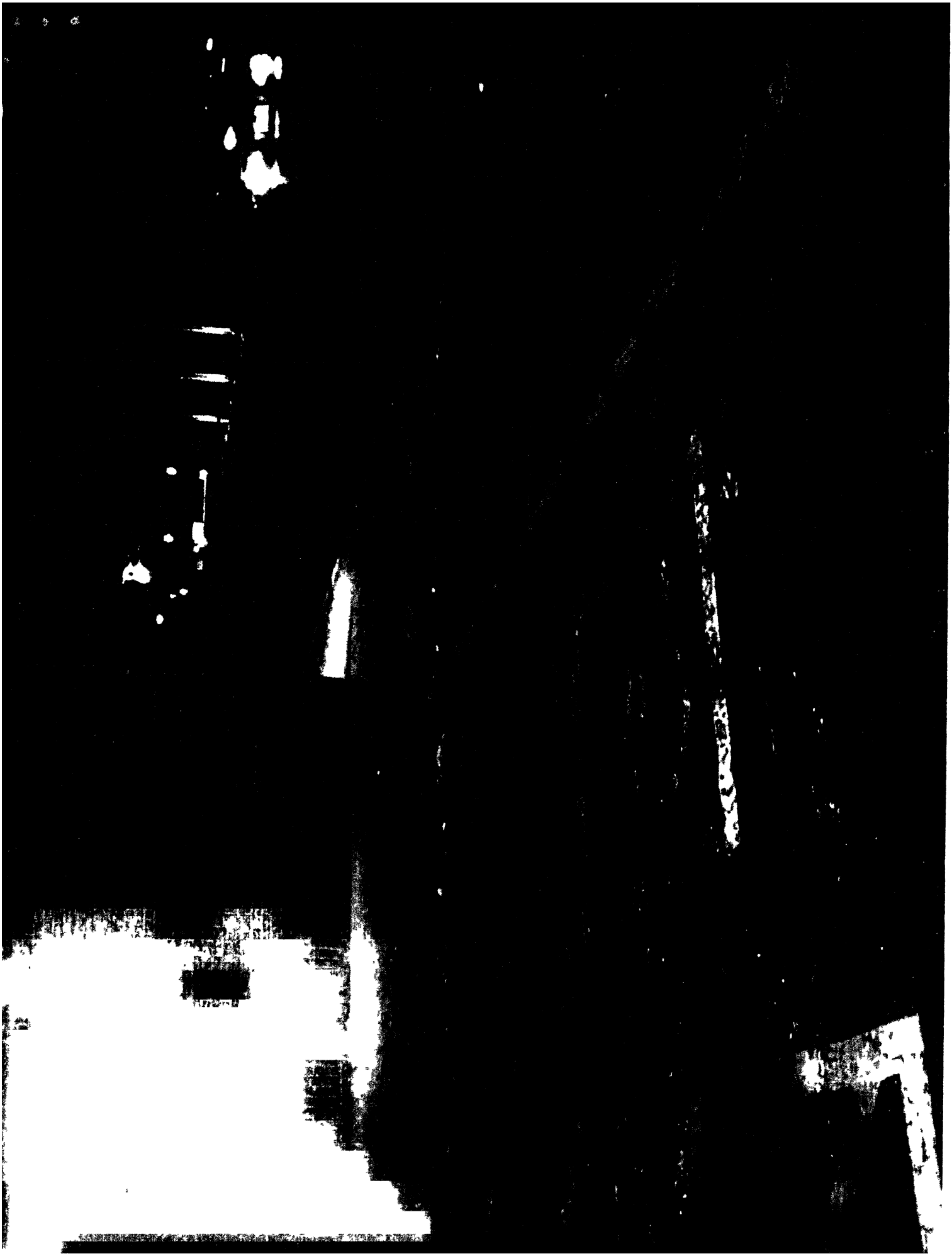
NOTARY PUBLIC, residing in Salt Lake County, Utah

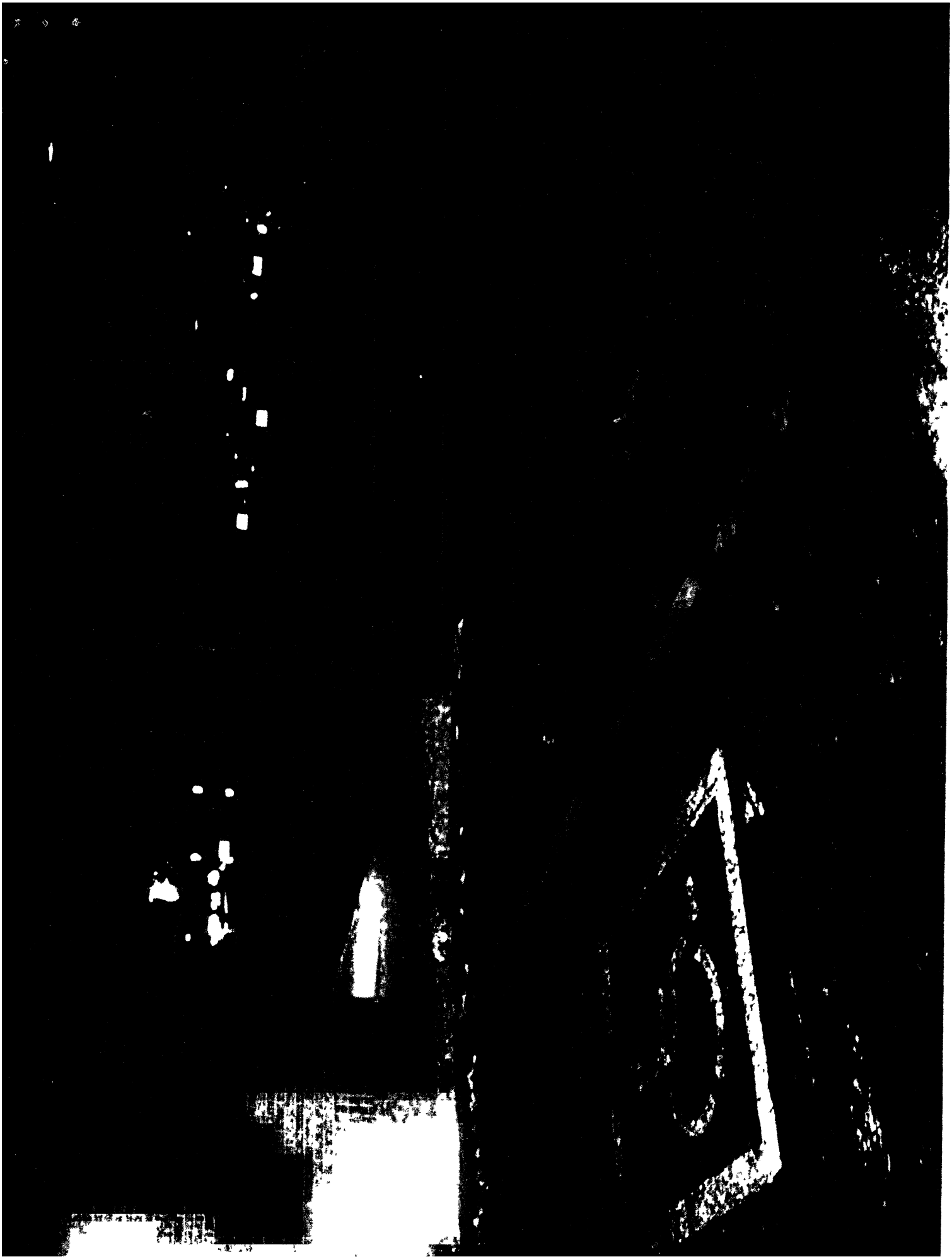




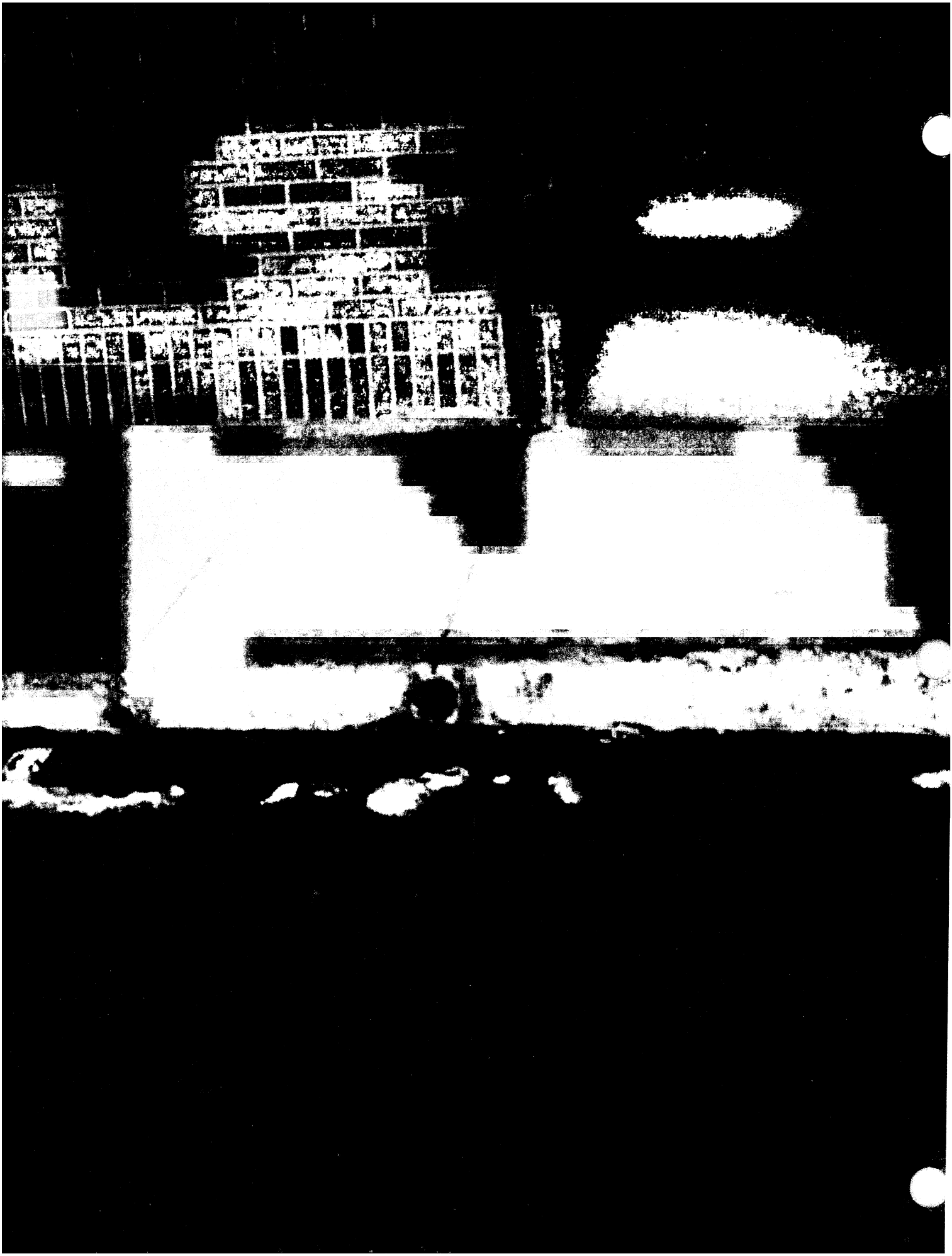
1
2
3
4

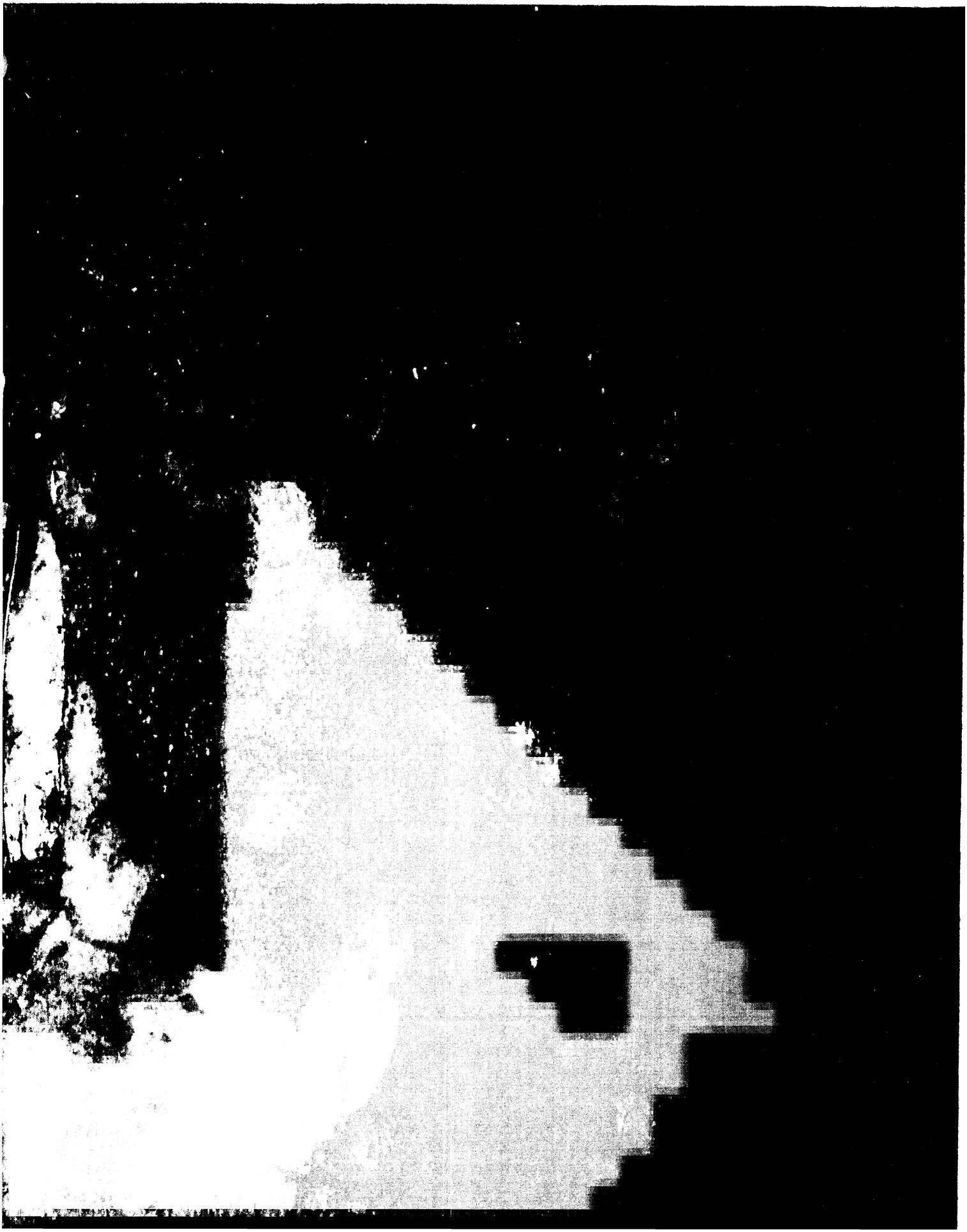






10
9
8
7
6
5
4
3
2





Tab 2

Earl S. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909
Telephone: (801) 699-8474

Iris M. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY

IRIS M. SPAFFORD, and
EARL S. SPAFFORD

Plaintiffs, } **DISCLOSURE OF EXPERT WITNESS**

vs.

Case No. 070911059

GRANITE CREDIT UNION,
A Utah Corporation, } **Judge Tyrone Medley**

Defendants.

In conformance with Rule 26(a)(3)(B) of the Utah Rules of Civil Procedure, Plaintiffs, Earl S. Spafford and Iris M. Spafford, In Propria Persona, hereby disclose that they have employed Clarence Kemp, P.E., Senior Project Engineer, to offer expert testimony in this matter. A copy of Mr. Kemp's report concerning the subject matter upon which he is expected to testify,

including but not limited to technical measurements of variable curb heights, sidewalk trip hazards, lack of maintenance pedestrian hazards, ADA violations, drain inlets and other drainage issues impacting pedestrian safety is appended hereto and incorporated herein. Additional supporting photographic exhibits are also a part of Mr. Kemp's expert witness report.

In making this disclosure, which was previously made to the Corporate Defendant's carrier, Plaintiffs reserve the right to work product and attorney client privilege, without waiving the same, except as otherwise disclosed herein.

DATED this 3rd day of August, 2009.

/ES/
Earl S. Spafford, In Propria Persona

/IS/
Iris M. Spafford, In Propria Persona

FORSGREN
ASSOCIATES / INC.

MMUNI(

3 December 2006

Patricia L. LaTulippe, Attorney at Law
Nielsen & Senior. P.C.
5217 South State Street, Suite 400
Salt Lake City, UT 84107

Re: Iris Spafford v. Granite Credit Union
Civil-Site Inspection Report

Dear Ms. LaTulippe:

As requested, we have inspected the Granite Credit Union site located at 6799 South 900 East in Midvale. This inspection focused primarily on civil-site construction and condition, particularly as it related to pedestrian safety. A brief summary of our findings follows:

I. General

The site was first inspected by myself in January of 2006. I again inspected the site on Friday, December 1st in order to verify the details for this report. It appears that no significant changes or site maintenance (pavement overlays, sidewalk replacement, trip hazard removal, etc) have occurred over the past year. The site is virtually unchanged from the previous site visit. A site overview is attached hereto.

II. Specific Observations

a) **Variable Curb Height on Building Perimeter Sidewalk:** The sidewalk running along the south side of the building edges the parking lot. There is no curb per se', but rather the sidewalk is simply constructed with an abrupt edge for pedestrians step up to from the parking area. The elevation "step" difference between the sidewalk and the parking lot varies from 2-inches to 9-inches. It is normal practice per APWA and most city standards to have a consistent curb height (normally 6-inches +/-). Given the pedestrian access to this sidewalk throughout its length from the parking area, I believe this is somewhat akin to a stairway with variable risers.

b) **East Sidewalk Trip Hazard (Design / Construction related):** The pedestrian sidewalk from 900 East Street (approaching from the west) was constructed with a 3-inch high step as a tie-in to the straight grades of the building perimeter sidewalk. This obvious trip hazard is not painted or otherwise marked to warn pedestrians. From a design (and ADA) standpoint, this step should not have been eliminated in favor of a minimal sidewalk slope to match grades at this location.

c) **Other Sidewalk Trip Hazards (Maintenance Related):** Three sidewalk trip-hazards were noted as shown on the attached sketch. These trip hazards are approximately ¾-inch high. We note that APWA *(Reference drawing 291 of APWA Manual of Standard Plans)* defines sidewalks with a vertical or horizontal displacement of ½" or more s defective, requiring replacement. These trip hazards appear to be related to settlement and have not been addressed since my inspection of a year ago.

d) **ADA Access Ramps:** There are asphalt ramps from the parking area to the door entrances on the south and east sides of the building. (We note that a sign on the west entrance indicates that it is for employees only.) The south public access ramp has a slope of approximately 10%, slightly in excess of the 1:12 (8.3%) standard ADA ramp slope contained in the *"Department of Justice ADA standards for Accessible Design (28 CFR Part 36). "* Perhaps more of a concern is the lack of appropriate markings identifying this ramp. While on-site, for example, I noted a older female customer with obvious a foot or leg injury that elected to limp over the curb rather that utilize the ramp.

e) **Drain Inlets and other Drainage Issues Impacting Pedestrian Safety:** The site was designed to sheet drain across the parking lot pavement areas from the outside perimeter toward two drain inlets located south and southeast of the building as shown on the attached sketch. The building roof drains discharge directly into the parking lot where they also sheet flow into the inlets, raising concerns about icing and related pedestrian safety. It was also noted that the pavement has settled around the south drain inlet, thus raising the concrete inlet and grate about ½-inch or more above the surrounding pavement, thus creating puddling, icing, and a potential trip hazard. The drain inlet box to the east has a badly damaged concave grate, similarly creating concerns relative to pedestrian safety.

III. Summary Conclusions

This development appears to be "cookie-cutter" in nature with the building's perimeter sidewalk matching the finish floor elevation of the building without regard to other site constraints. The surrounding parking lot and sidewalk infrastructure appears to have been designed and constructed to primarily address surface drainage. Pedestrian safety appears to have been almost an afterthought of the design/construction process.

The parking lot is laid out to encourage pedestrian access to the building from virtually any path or direction, depending on where one is parked. This is problematic from the standpoint of pedestrian safety due to the items discussed above including variable curb heights, sidewalk trip hazards, adverse grades on drainage inlets, etc.

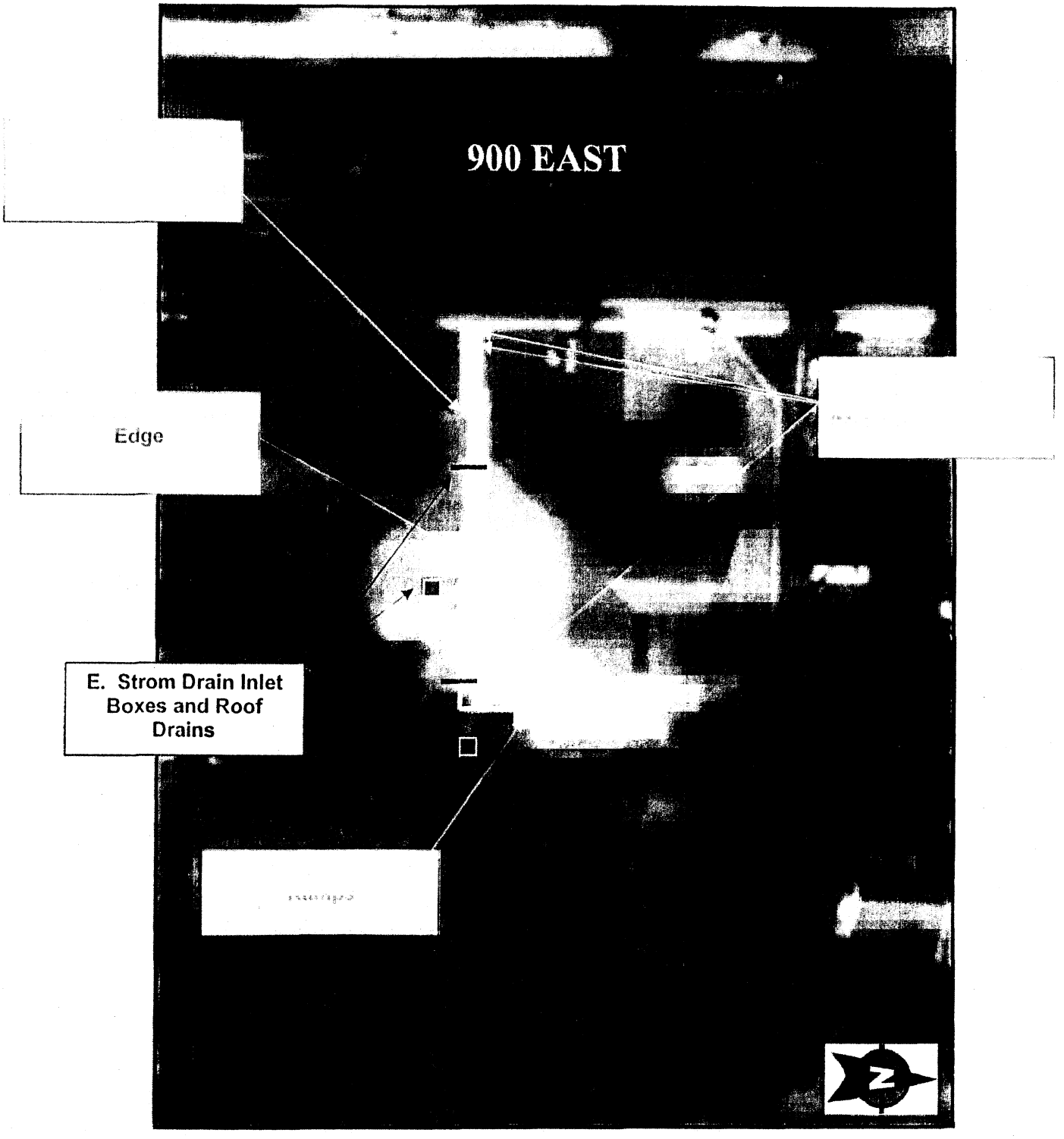
As you know, we have not seen the original site-design drawings for the project. If such drawings still exist, I would suspect that they were likely lacking in specific curb and parking lot grade elevations and details, leaving this responsibility to the contractor. These construction-related problems have been further aggravated by the lack of site maintenance.

I hope that this information is helpful as you determine how to best proceed with this litigation. Please feel free to call if you wish to discuss this report or if we can be of further service.

Sincerely,

Forsgren Associates, Inc.

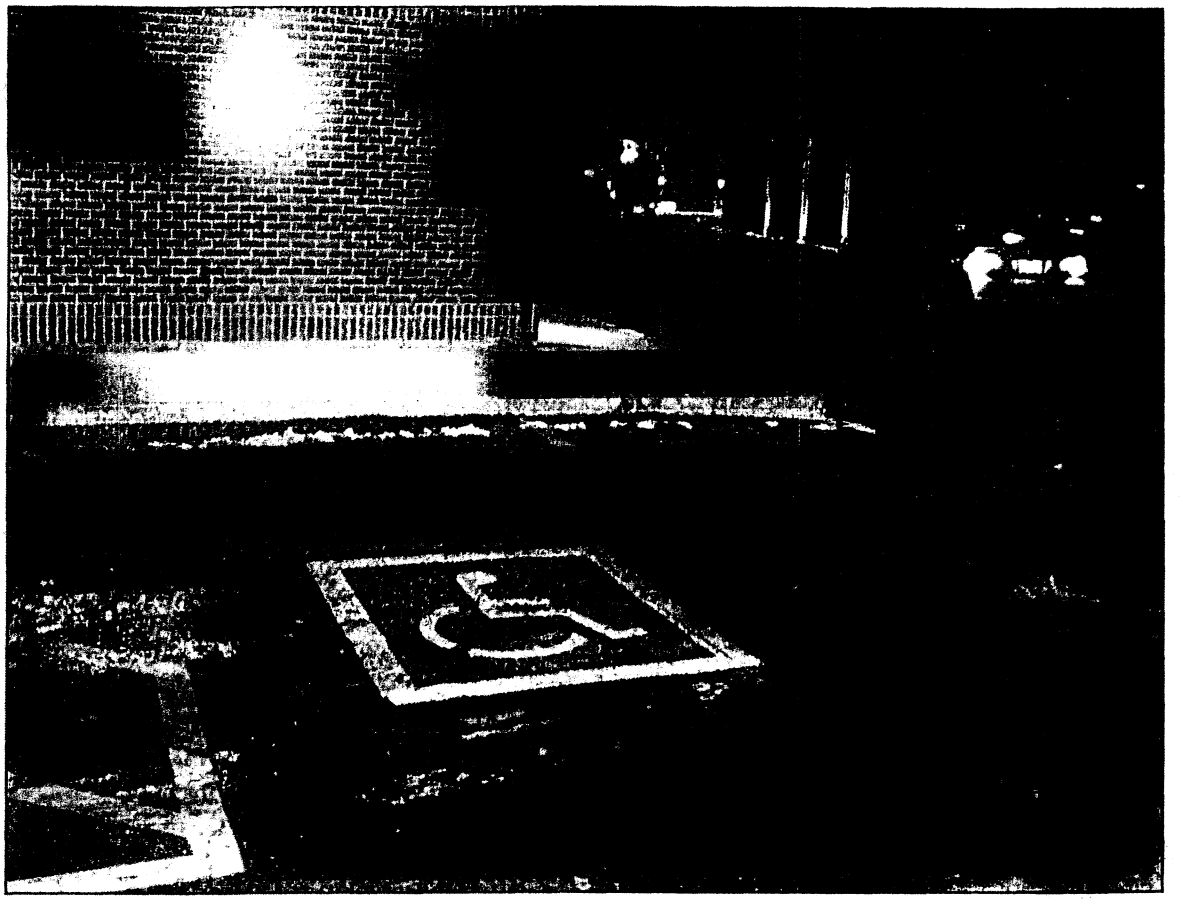
Clarence Kemp, P.E.
Sr. Project Engineer



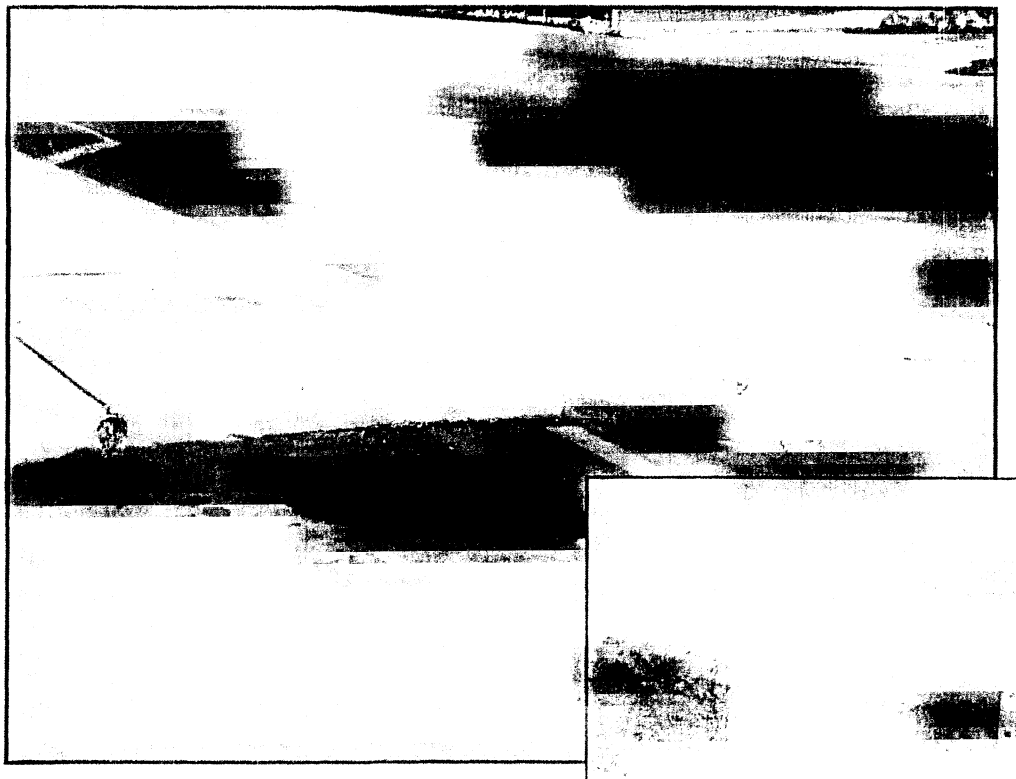
Granite Credit Union
Site Overview
(6799 South 900 East, Midvale, Utah)

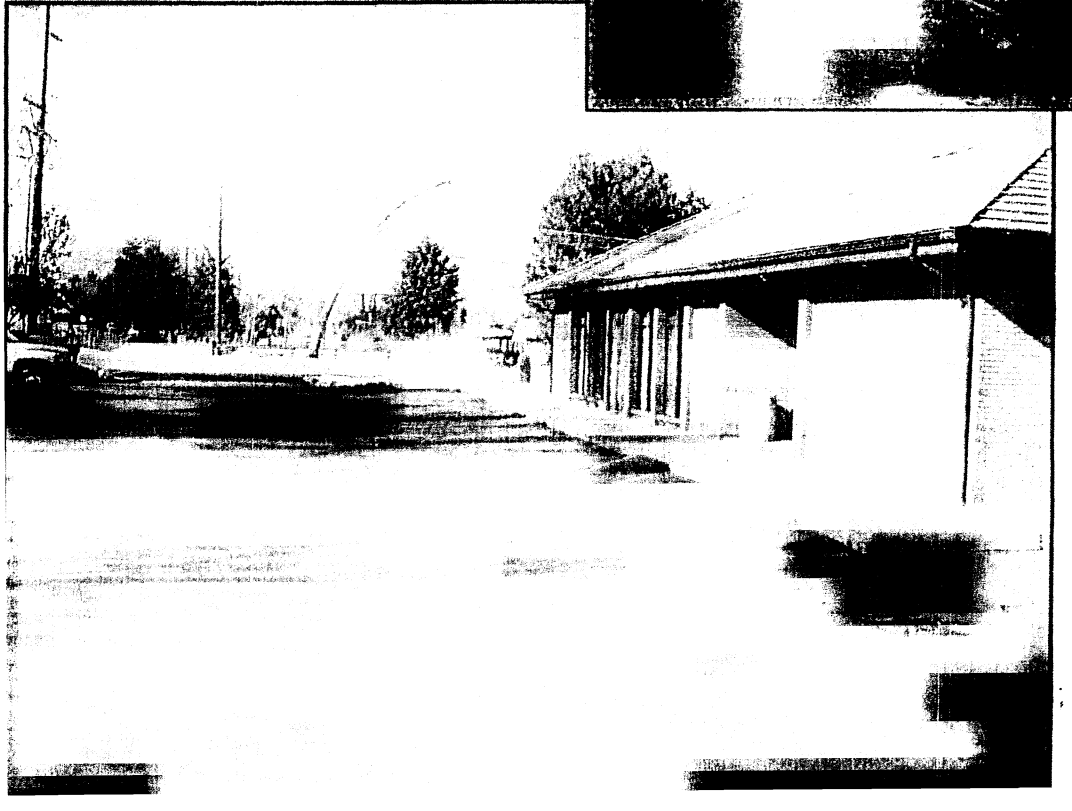
FORSGREN

Granite Credit Union Site Photo Log
(A. Building Perimeter Sidewalk)

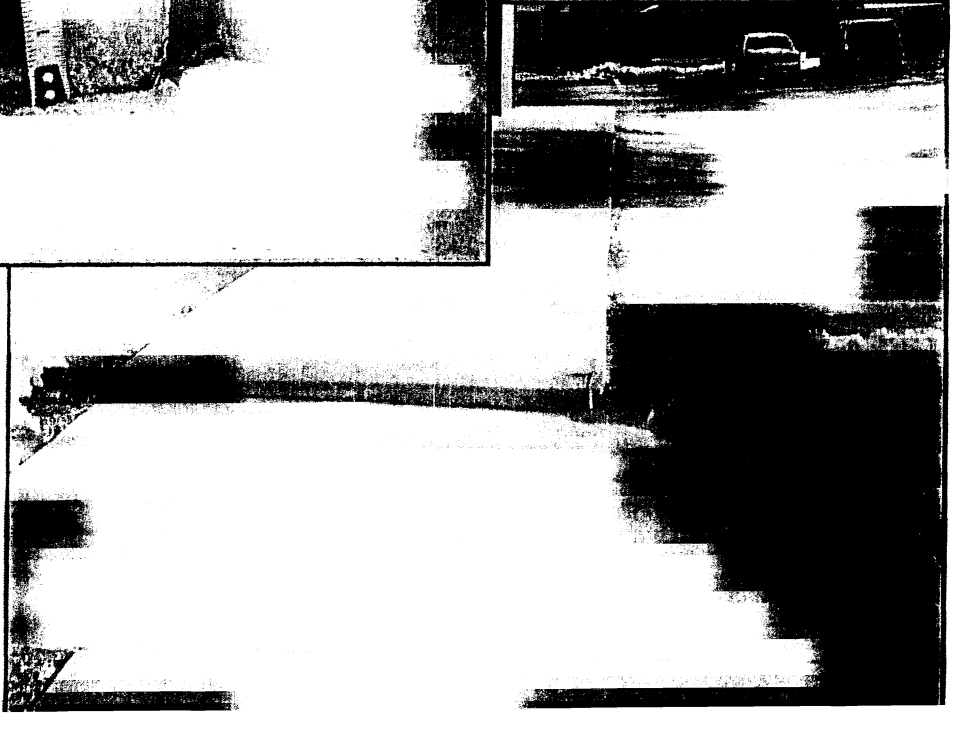


Granite Credit Union Site Photo Log
(A. Building Perimeter Sidewalk)

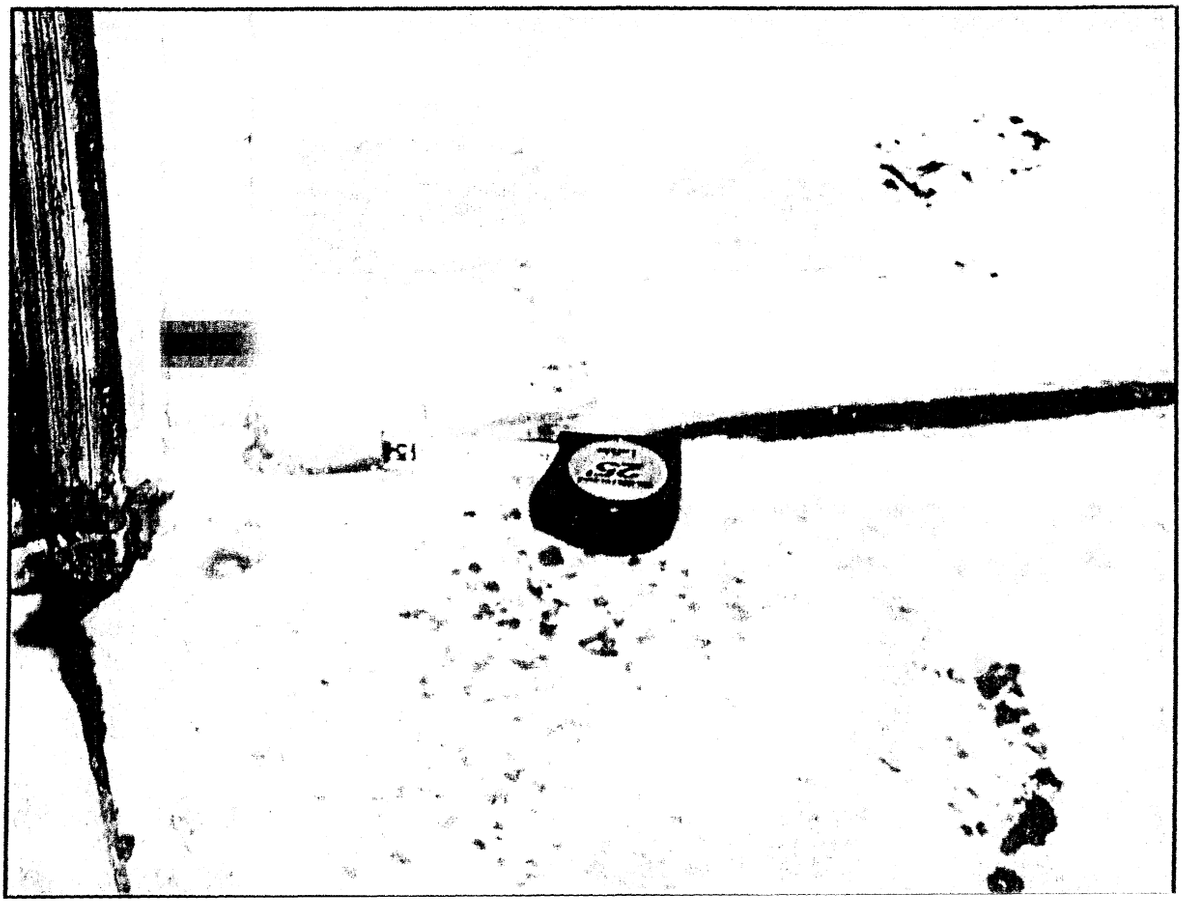




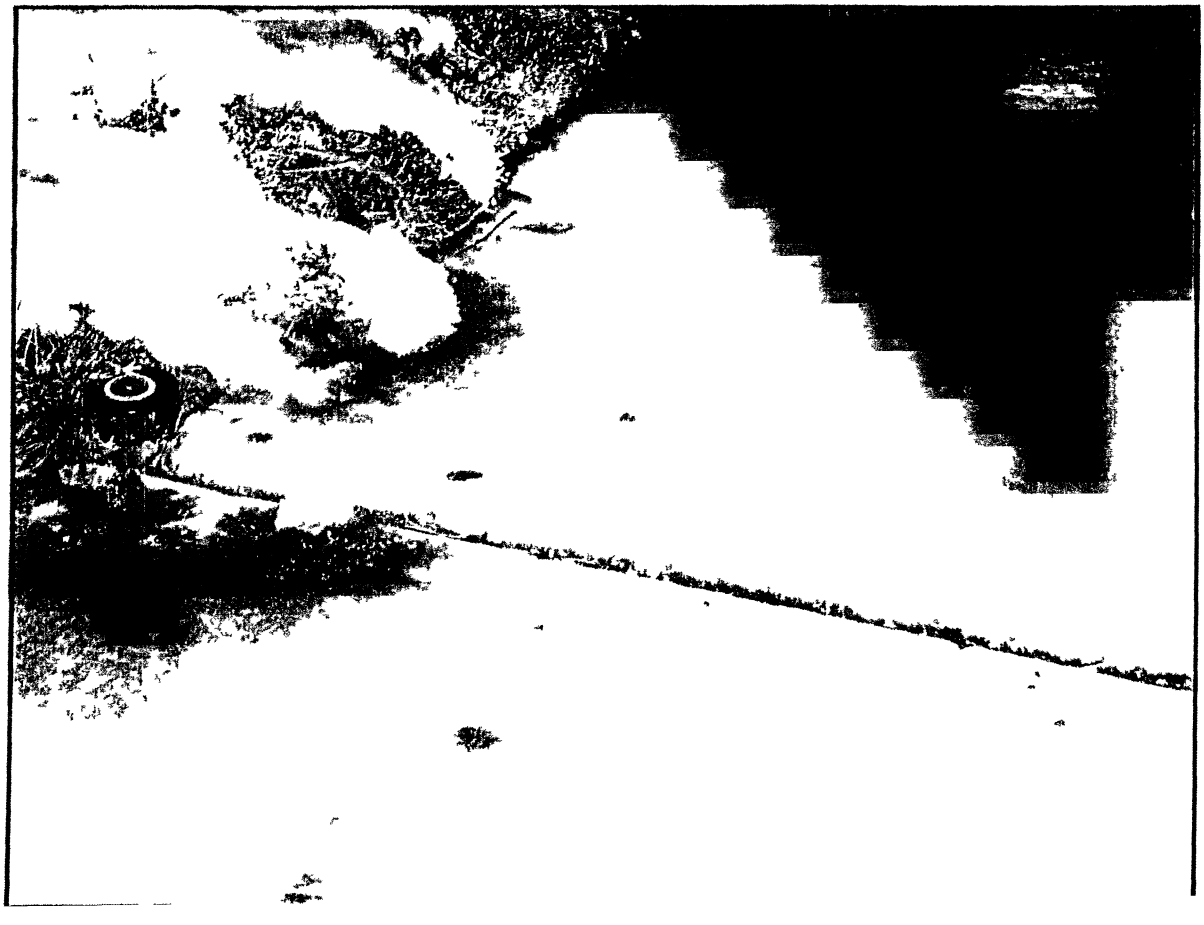
Granite Credit Union Site Photo Log
(B. Sidewalk Trip Hazard)



Granite Credit Union Site Photo Log
(C. Other Sidewalk trip hazards)



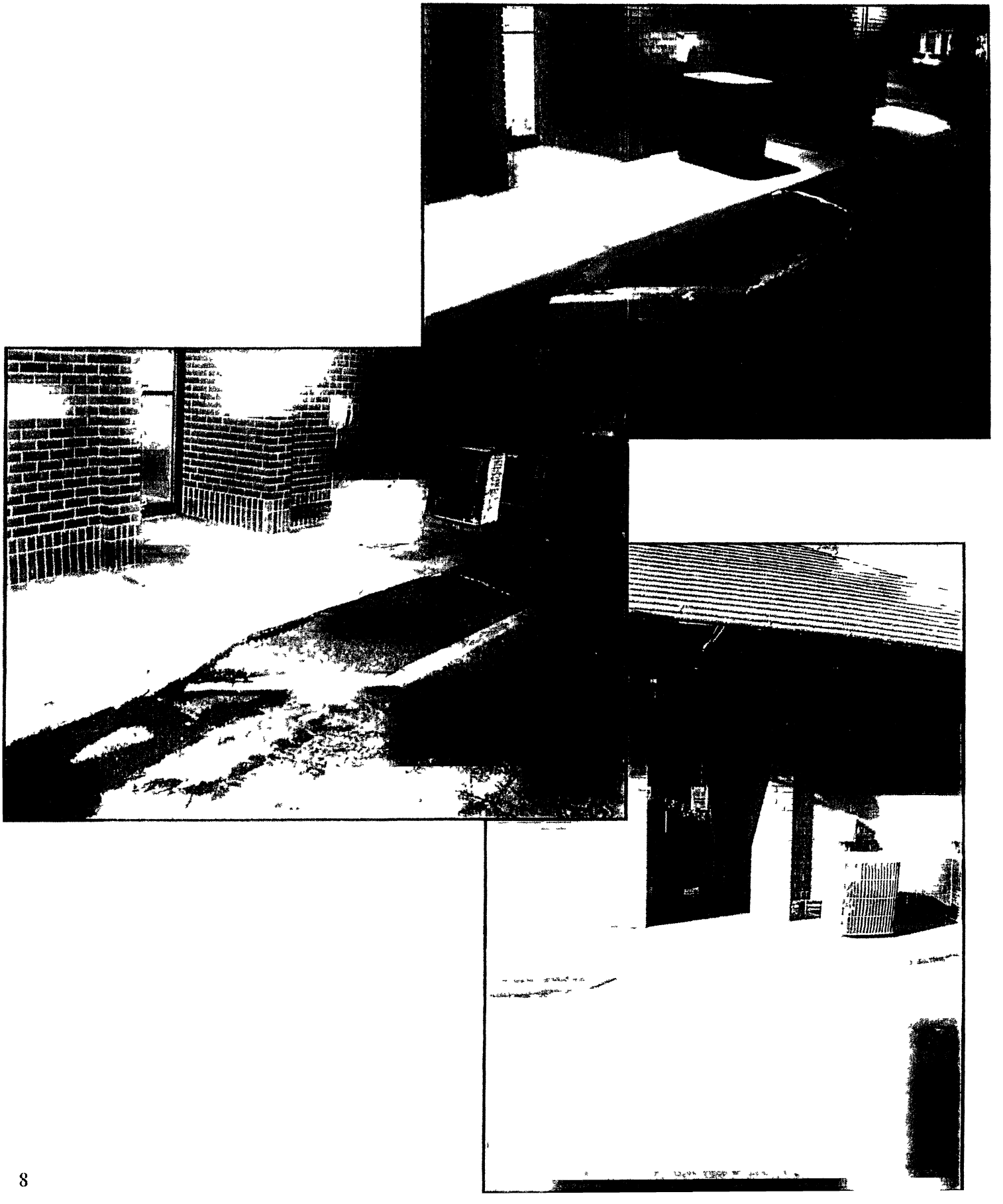
Granite Credit Union Site Photo Log
(C. Other Sidewalk trip hazards)



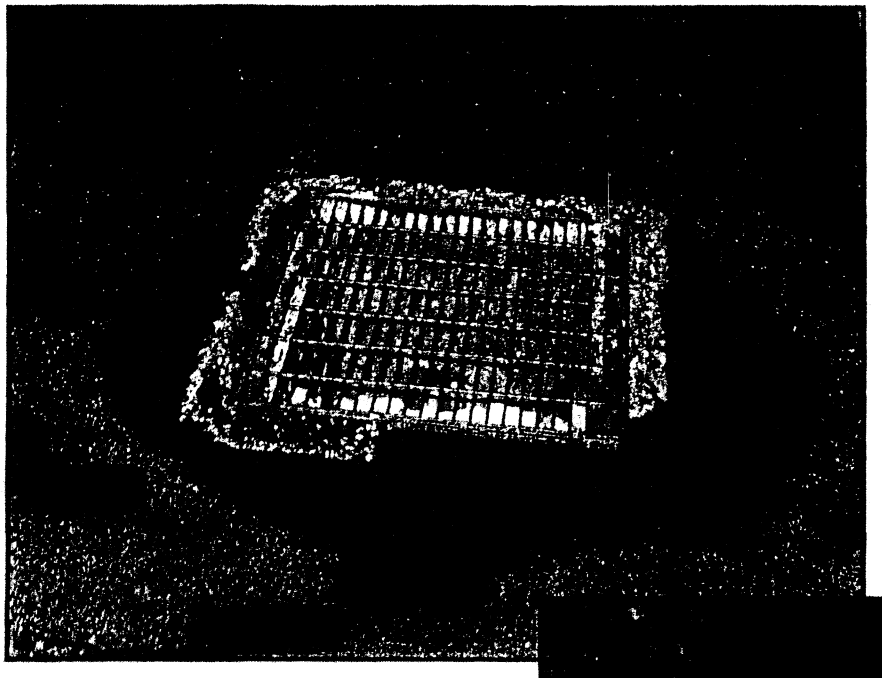
Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—South)

Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—South)

Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—East)



Granite Credit Union Site Photo Log
(E. Storm Drain Boxes and Roof Drains)



Granite Credit Union Site Photo Log
(E. Storm Drain Boxes and Roof Drains)

Tab 3

MRA FORENSIC SCIENCES

Matthew Moncur
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221

June 10, 2009

RE. Iris and Earl Spafford v. Granite Credit Union
MRA No.: A789

Preliminary Inspection Report

Background:

According to the complaint, on or about April 4 2005, Ms. Spafford exited the passenger side of the car her husband had parked in the eastern most stall on the south side of the subject Granite Credit Union. She walked northward to the sidewalk in front of the stall. As she attempted to step up the east curb to the sidewalk, she lost her balance and fell backward Reportedly she was injured The complaint indicated that the property's dangerous and defective condition caused the accident. MRA Forensic Sciences was asked to inspect the property located at 6799 South 900 East Midvale, Utah, and form an opinion about matter.

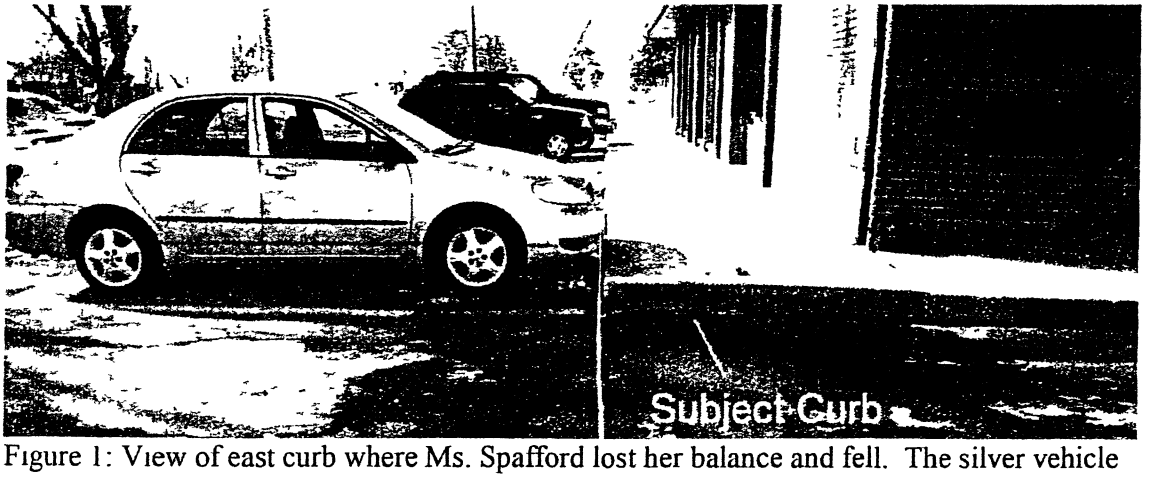


Figure 1: View of east curb where Ms. Spafford lost her balance and fell. The silver vehicle is parked approximately where the Spafford car had been parked.

Information Reviewed:

- MRA Forensic Sciences 02/15/08 inspection of the Granite Credit Union parking lot, curb and sidewalk.
- Complaint for case number 070911059.

- Granite Credit Union inspection report written by Clarence Kemp, PE, of Forsgren Associates, Inc.
- Conversation with a Midvale, Utah building department official.

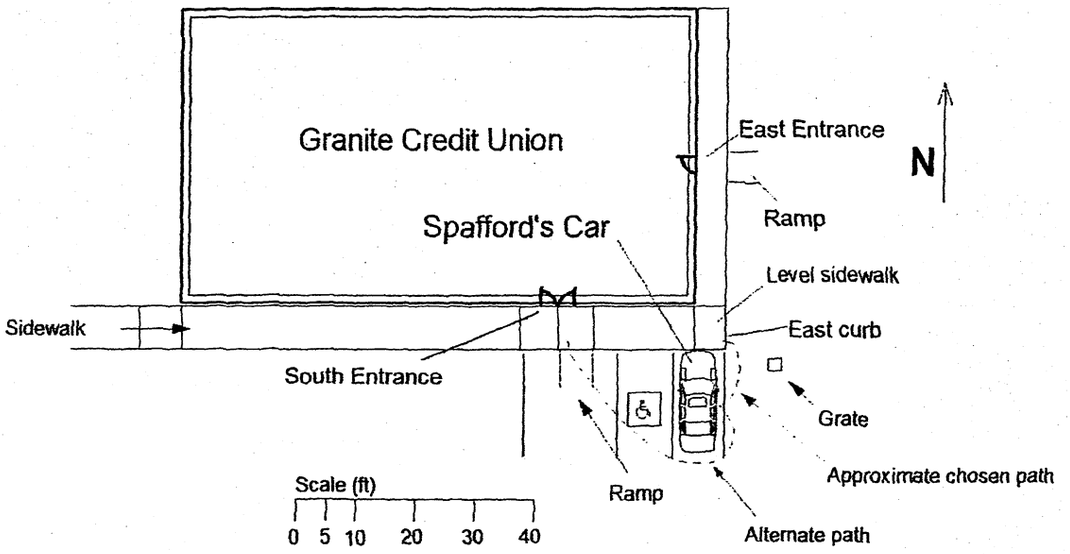


Figure 2: Credit Union site map.

Findings:

- The asphalt pavement, curb and sidewalk features encountered by Ms. Spafford as she made her way to the credit union building were not in violation of building code requirements. The features were neither dangerous nor defective. The top of the curb and sidewalk was substantially level.

Discussion:

Reportedly the subject property was built around 1988. This investigator believes that the property features relevant to this case had not been significantly altered between the time of the accident and the MRA inspection.

Paragraph 11 of the complaint stated that Ms. Spafford "had" to step up the east facing curb because there was not enough room for her to step up the south curb. However, there would have been enough room if Mr. Spafford had parked further away from the curb. Even parking as he did Ms. Spafford did not have to attempt to ascend the east curb. She could have taken an alternate route. For example, she could have walked around the back of the car to reach the curb ramp outside the south entrance. Or, she could have continued walking along the east curb to the ramp outside the east entrance (Figures 2 and 3). Alternately, she could have been dropped off outside the building's south entrance before the car was parked. The alternatives were not used. Ms. Spafford's chose to attempt to step up the east curb.

Paragraph 12 stated, "the curb is unmarked and is dangerous in that it is uneven". It stated, "the curb quickly begins to slant downward towards the building so that when one is trying to step up onto the curb the left foot must step up higher than the right foot by several inches". It stated, "there is no handrail to block the area from pedestrians or to assist a pedestrian with his/her balance in stepping up on the uneven walkway. Nor is there a warning to advise the patron to be careful when stepping up". In fact, measurements with a digital level showed that the top of the curb and the sidewalk beyond were on average within a fraction of one degree of being level. The complaint statement that the left foot must step up higher than the right foot by several inches greatly mischaracterized the condition of the substantially level curb and sidewalk; a level surface has the same elevation all over. A person stepping up the curb would have to raise the second foot to the level of the first. The statement that the curb quickly slants toward the building is inaccurate; the sidewalk is nearly perfectly level. This is not defective or dangerous; this is the normal and expected condition of a curb and sidewalk.

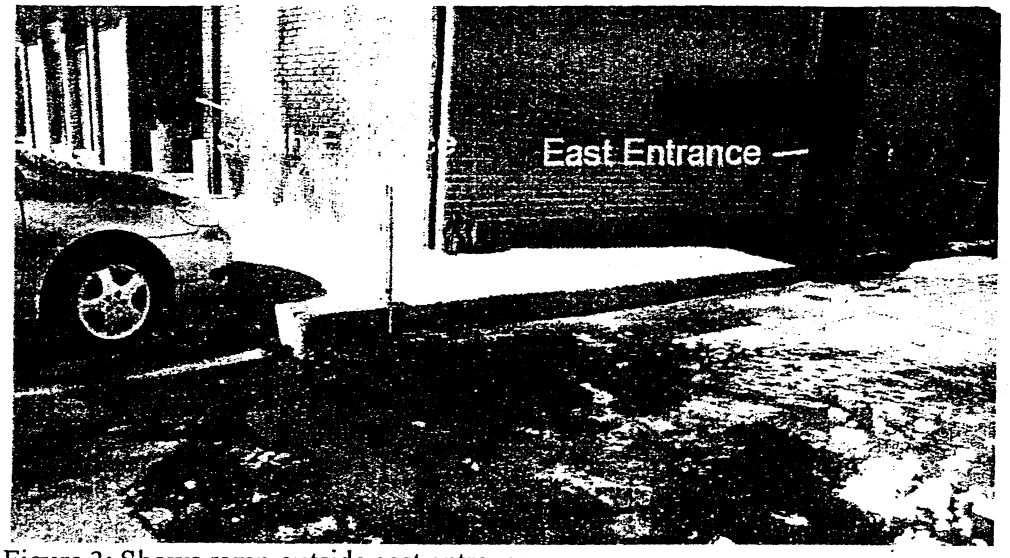


Figure 3: Shows ramp outside east entrance.

Figure 4: The ramp outside the south entrance.

Paragraph 13 of the complaint stated that there was a drain in the parking lot located a few feet southeast of the sidewalk area and the asphalt around the drain sloped toward the drain to allow water to flow to the drain. It stated that the sloped pavement was a problem because it required a customer to exert extra effort to walk up to the curb. Measurements found that the drain's nearest point was 7-foot 4-inches east of the east curb edge and 1-foot 7-inches south of the south curb edge. The pavement did sloped toward the drain, as it must for water to flow to the drain. It is true that walking up slope takes more effort than walking across level ground. It is not clear that this is a problem. Many persons were seen walking toward and stepping up the curb during the MRA inspection. None showed any observed sign of hesitation or difficulty. Each simply approached the curb, stepped up, and moved on.

The Forsgren Associates property inspection report found variable elevation difference between the parking lot pavement and the sidewalk. The elevation ranged from 2 to 9 inches. MRA measurements confirmed this finding, however, the elevation change was gradual as one moved along the curb/sidewalk edge. This was particularly true of the curb in the area of the accident. The southeast curb/sidewalk corner measured about 8-3/4-inches tall. Measured 6-inches north of the corner, the east curb face was about 8-inches tall. 6-inches further along, the curb was still 8-inches tall. 4-feet north of the corner the curb height was 7-1/2 inches, varying only ½-inch in 3-feet. The Forsgren report said that it is normal practice per APWA and most city standards to have a consistent curb height (normally 6-inches +/-). This does not mean the height is required by code; it is not. A Midvale, Utah building department representative stated that they did not have a curb height requirement other than what was needed to meet ADA standards. The representative observed that in 1988, when the property was developed, ADA requirements did not exist. It should be noted that an 8-inch curb is not remarkably tall. Stair step riser heights of 7-3/4 inches are commonly found. It is more critical that the top of the curb be level, which it was.

Paragraph 14 of the complaint stated, "Ms. Spafford attempted to step up onto the eastside curb of the sidewalk with her right foot. As she went to lift her left foot, she did not get her foot up completely onto the higher part of the curb. Ms. Spafford lost her balance and fell backward towards the drain hitting her head on the asphalt of the parking lot." This statement indicated that Ms. Spafford was unable to raise her left foot to the height of her right foot which she had successfully placed on top of the level curb. Her backward fall indicated that she had no forward momentum; otherwise she would have fallen forward. Together these things suggested that Ms. Spafford labored to step up onto the curb, and was physically unable to complete the step.

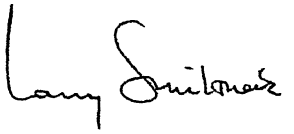
Conclusion:

It is the opinion of this investigator that Ms. Spafford chose to attempt to step up the east curb onto the sidewalk, although alternate routes with ramps were available to her. She did not have to ascend the curb as she did. Even so, the pavement, curb and sidewalk features she encountered immediately prior to her accident were not defective or dangerous. The curb/sidewalk was substantially normal. It was level, about the same height as an ordinary step, and many persons were observed stepping up the curb without difficulty. This

suggested that the accident was caused by something other than the condition of the Granite Credit Union pavement, curb and sidewalk.

The opinions expressed in this report are based on the review information. They may need to be reconsidered if new information becomes available.

Best regards,



Larry Smiltneek, MS, PSE

Tab 4

Earl S. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909
Cellular: (801) 699-8474

Iris M. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

IRIS M. SPAFFORD, and **EARL S. SPAFFORD**	}	
Plaintiffs,		**AMENDED** **DISCLOSURE OF EXPERT WITNESS**
	}	
vs.		
	}	
GRANITE CREDIT UNION, **A Utah Corporation,**	}	Case No. 070911059
Defendants.		**Judge Tyrone Medley**
	}	

COMES NOW THE PLAINTIFFS, Earl S. Spafford and Iris M. Spafford, In Propria Persona, pursuant to Utah R. Civ. P. 26(a)(3)(B), and as further allowed under the exemption requirement of Utah R. Civ. P. 26(a)(2)(A)(vi), to hereby disclose that it has employed Clarence S. Kemp, P.E. to offer expert testimony in this matter. A copy of a report containing the subject matter upon which Mr. Kemp is expected to testify and the grounds for his opinion is attached

hereto and marked Exhibit A. In addition, a copy of Mr. Kemp's qualifications, including publications, and rate of compensation for his expert testimony is marked Exhibit B, and appended hereto.

DATED this 23rd day of September, 2009

/s/
Earl S. Spafford, In Propria Persona

/s/
Iris M. Spafford, In Propria Persona

EXHIBIT B

COMPENSATION

For purposes of preparing his report, reaching his expert witness conclusion, investigation, and testimony in deposition or at trial, in the present case, Mr. Kemp is compensated at the rate of $200. per hour.

For hands on construction design or supervision of Streets or Sidewalk Projects, Municipal Engineering, Storm Drainage Conveyance/Hydrology, or for the drafting of Municipal Safe Sidewalk and/or Safe building Ordinances or Municipal Safety Standards, his fees may vary, based upon a bid award system, made on behalf of Forsgren Associates.

QuickTime Player.lnk

FORSGREN
ASSOCIATES / INC.

COMMUNIC

3 December 2006

Patricia L. LaTulippe, Attorney at Law
Nielsen & Senior. P.C.
5217 South State Street, Suite 400
Salt Lake City, UT 84107

Re: Iris Spafford v. Granite Credit Union
Civil-Site Inspection Report

Dear Ms. LaTulippe:

As requested, we have inspected the Granite Credit Union site located at 6799 South 900 East in Midvale. This inspection focused primarily on civil-site construction and condition, particularly as it related to pedestrian safety. A brief summary of our findings follows:

I. General

The site was first inspected by myself in January of 2006. I again inspected the site on Friday, December 1st in order to verify the details for this report. It appears that no significant changes or site maintenance (pavement overlays, sidewalk replacement, trip hazard removal, etc) have occurred over the past year. The site is virtually unchanged from the previous site visit. A site overview is attached hereto.

II. Specific Observations

a) **Variable Curb Height on Building Perimeter Sidewalk:** The sidewalk running along the south side of the building edges the parking lot. There is no curb per se', but rather the sidewalk is simply constructed with an abrupt edge for pedestrians step up to from the parking area. The elevation "step" difference between the sidewalk and the parking lot varies from 2-inches to 9-inches. It is normal practice per APWA and most city standards to have a consistent curb height (normally 6-inches +/-). Given the pedestrian access to this sidewalk throughout its length from the parking area, I believe this is somewhat akin to a stairway with variable risers.

b) **East Sidewalk Trip Hazard (Design / Construction related):** The pedestrian sidewalk from 900 East Street (approaching from the west) was constructed with a 3-inch high step as a tie-in to the straight grades of the building perimeter sidewalk. This obvious trip hazard is not painted or otherwise marked to warn pedestrians. From a design (and ADA) standpoint, this step should not have been eliminated in favor of a minimal sidewalk slope to match grades at this location.

c) **Other Sidewalk Trip Hazards (Maintenance Related):** Three sidewalk trip-hazards were noted as shown on the attached sketch. These trip hazards are approximately ¾-inch high. We note that APWA *(Reference drawing 291 of APWA Manual of Standard Plans)* defines sidewalks with a vertical or horizontal displacement of ½" or more s defective, requiring replacement. These trip hazards appear to be related to settlement and have not been addressed since my inspection of a year ago.

d) **ADA Access Ramps:** There are asphalt ramps from the parking area to the door entrances on the south and east sides of the building. (We note that a sign on the west entrance indicates that it is for employees only.) The south public access ramp has a slope of approximately 10%, slightly in excess of the 1:12 (8.3%) standard ADA ramp slope contained in the *"Department of Justice ADA standards for Accessible Design (28 CFR Part 36). "* Perhaps more of a concern is the lack of appropriate markings identifying this ramp. While on-site, for example, I noted a older female customer with obvious a foot or leg injury that elected to limp over the curb rather that utilize the ramp.

e) **Drain Inlets and other Drainage Issues Impacting Pedestrian Safety:** The site was designed to sheet drain across the parking lot pavement areas from the outside perimeter toward two drain inlets located south and southeast of the building as shown on the attached sketch. The building roof drains discharge directly into the parking lot where they also sheet flow into the inlets, raising concerns about icing and related pedestrian safety. It was also noted that the pavement has settled around the south drain inlet, thus raising the concrete inlet and grate about ½-inch or more above the surrounding pavement, thus creating puddling, icing, and a potential trip hazard. The drain inlet box to the east has a badly damaged concave grate, similarly creating concerns relative to pedestrian safety.

III. Summary Conclusions

This development appears to be "cookie-cutter" in nature with the building's perimeter sidewalk matching the finish floor elevation of the building without regard to other site constraints. The surrounding parking lot and sidewalk infrastructure appears to have been designed and constructed to primarily address surface drainage. Pedestrian safety appears to have been almost an afterthought of the design/construction process.

The parking lot is laid out to encourage pedestrian access to the building from virtually any path or direction, depending on where one is parked. This is problematic from the standpoint of pedestrian safety due to the items discussed above including variable curb heights, sidewalk trip hazards, adverse grades on drainage inlets, etc.

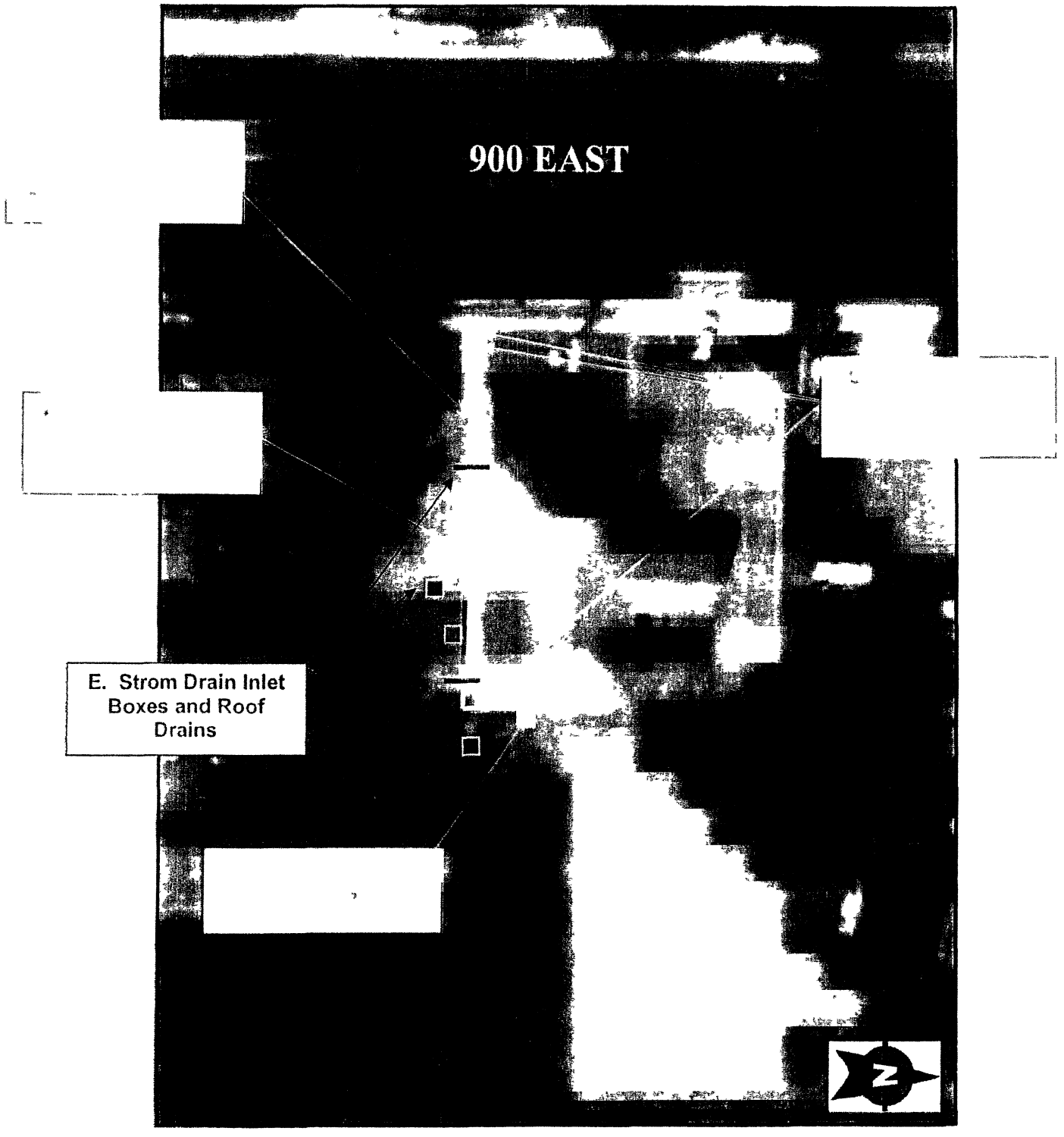
As you know, we have not seen the original site-design drawings for the project. If such drawings still exist, I would suspect that they were likely lacking in specific curb and parking lot grade elevations and details, leaving this responsibility to the contractor. These construction-related problems have been further aggravated by the lack of site maintenance.

I hope that this information is helpful as you determine how to best proceed with this litigation. Please feel free to call if you wish to discuss this report or if we can be of further service.

Sincerely,

Forsgren Associates, Inc.

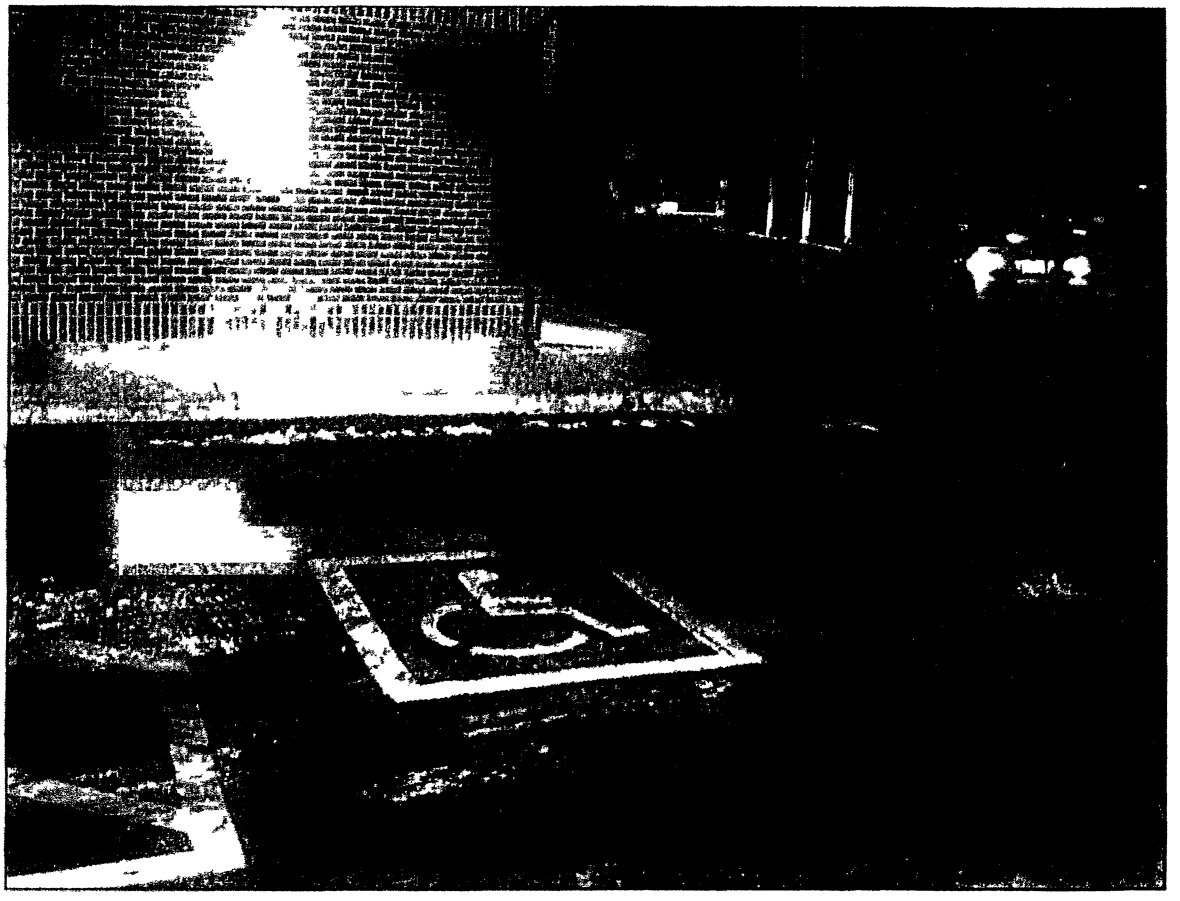
Clarence Kemp, P.E.
Sr. Project Engineer



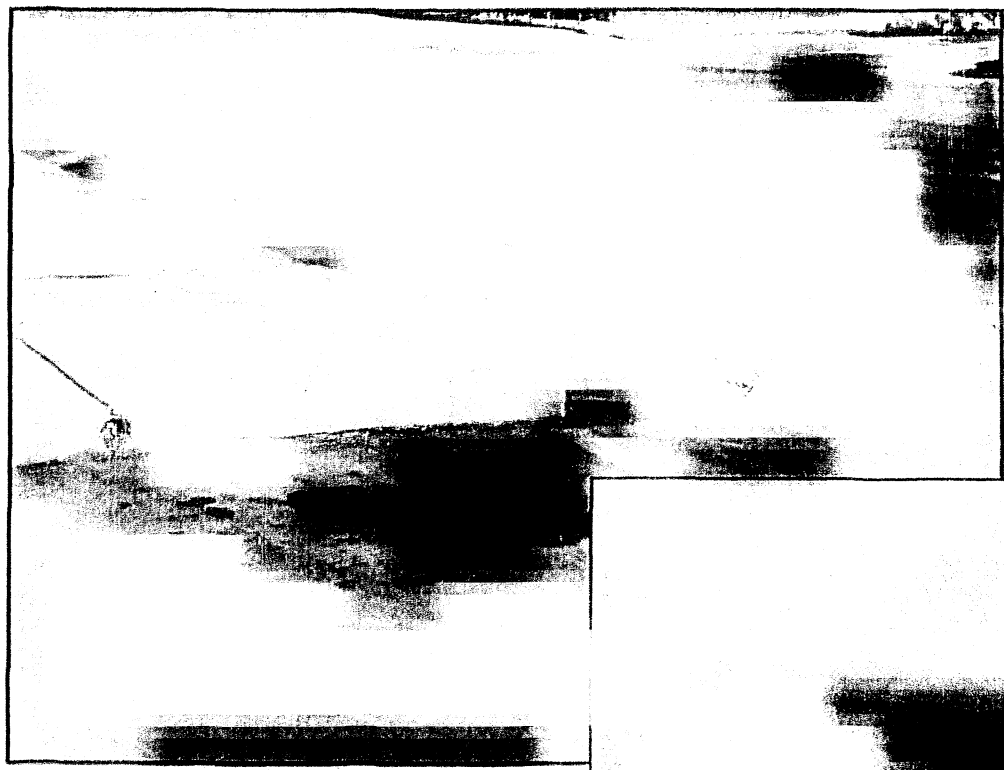
Granite Credit Union
Site Overview
(6799 South 900 East, Midvale, Utah)

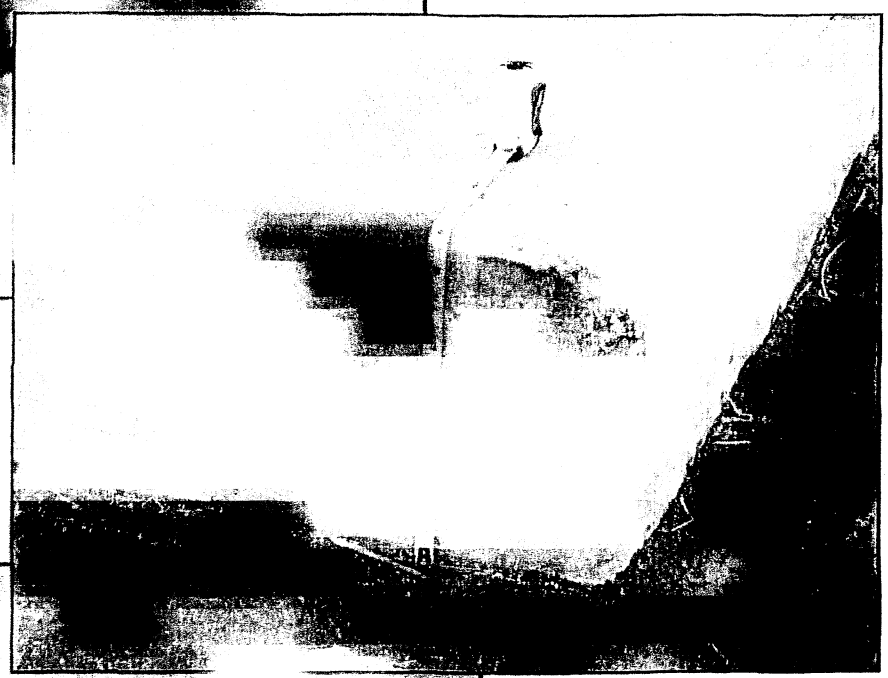
FORSGREN

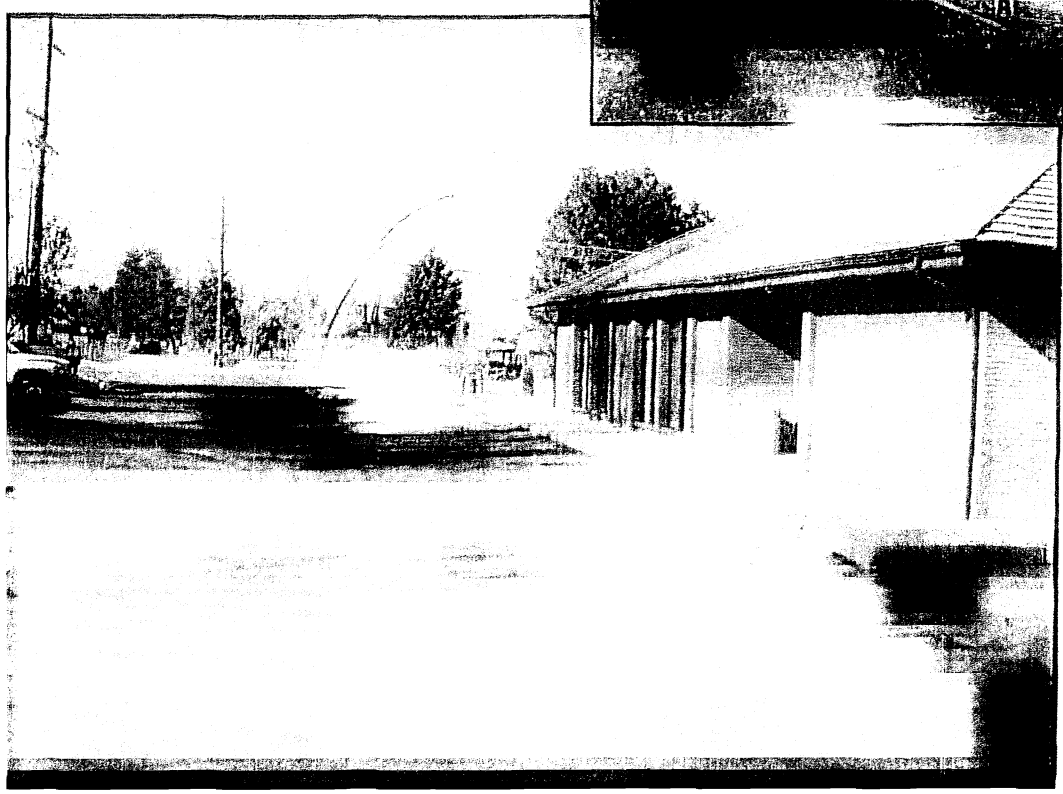
Granite Credit Union Site Photo Log
(A. Building Perimeter Sidewalk)



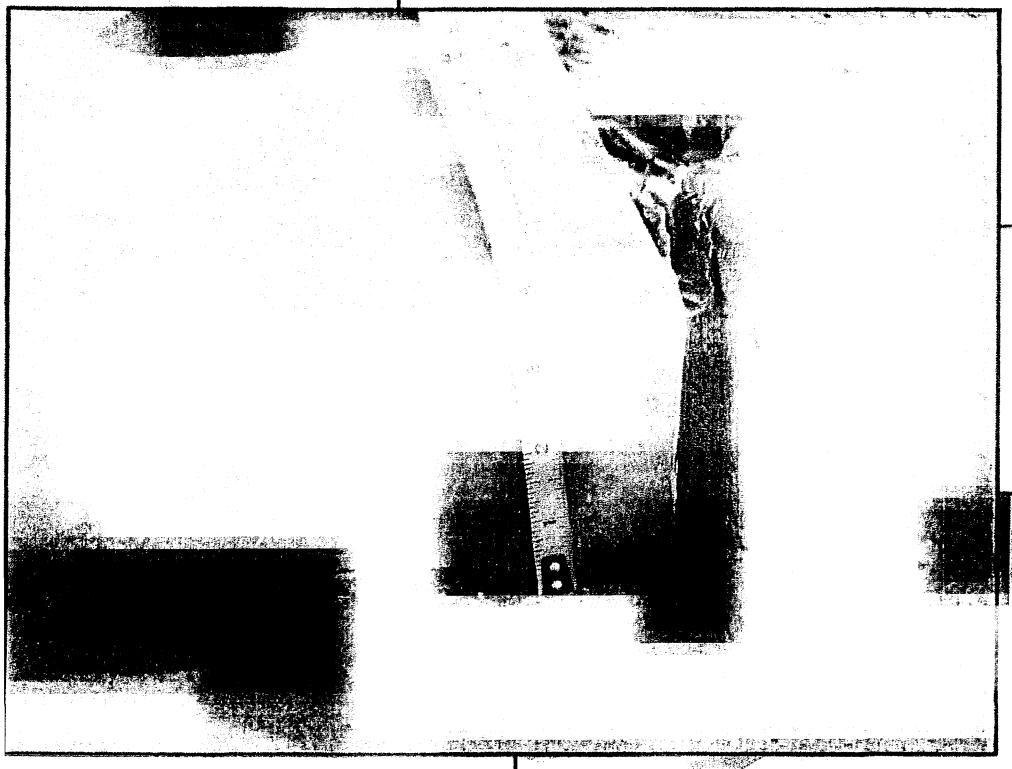
Granite Credit Union Site Photo Log
(A. Building Perimeter Sidewalk)

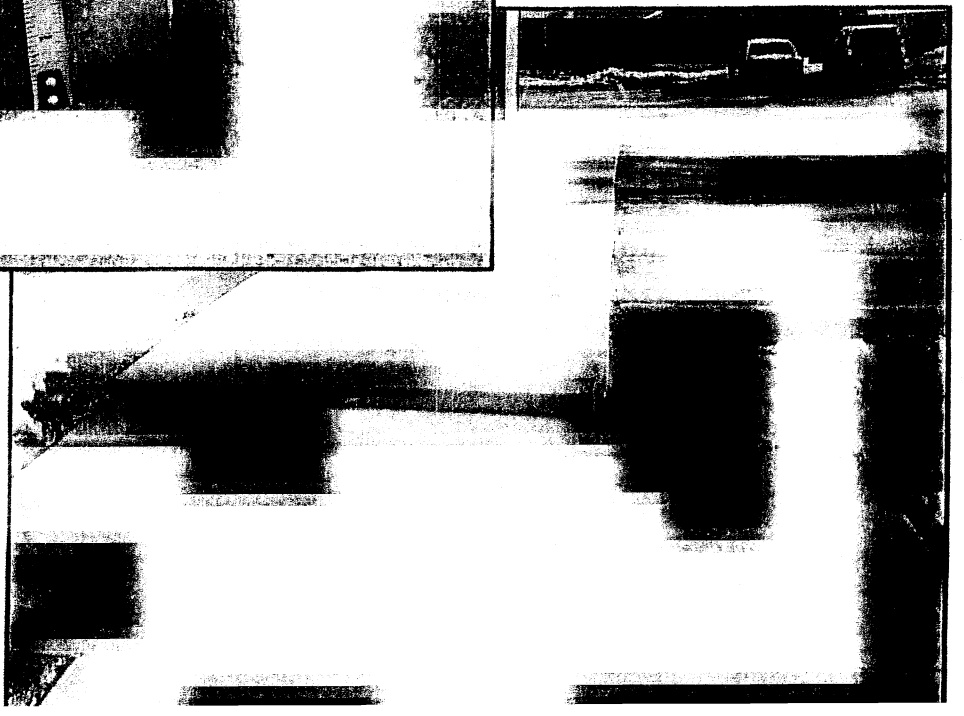




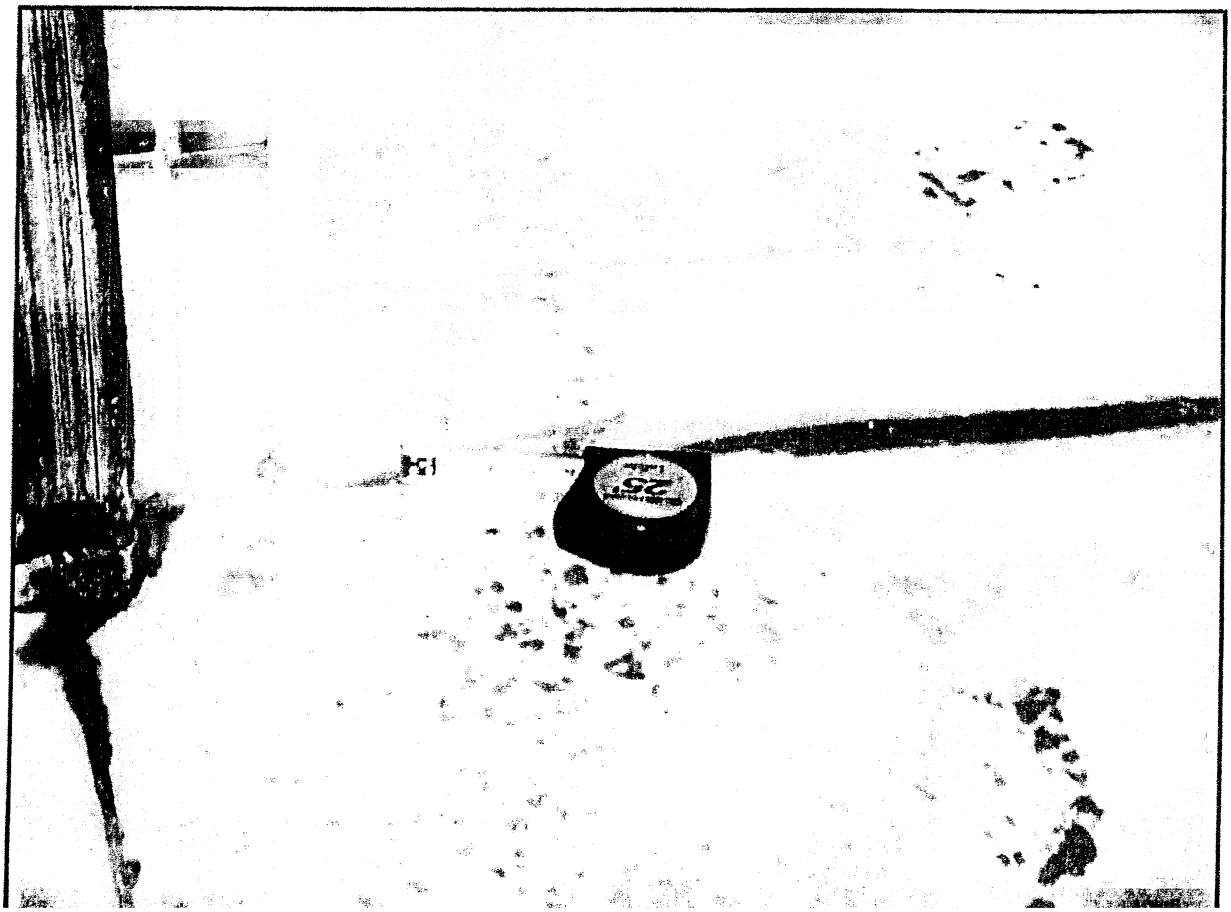


Granite Credit Union Site Photo Log
(B. Sidewalk Trip Hazard)



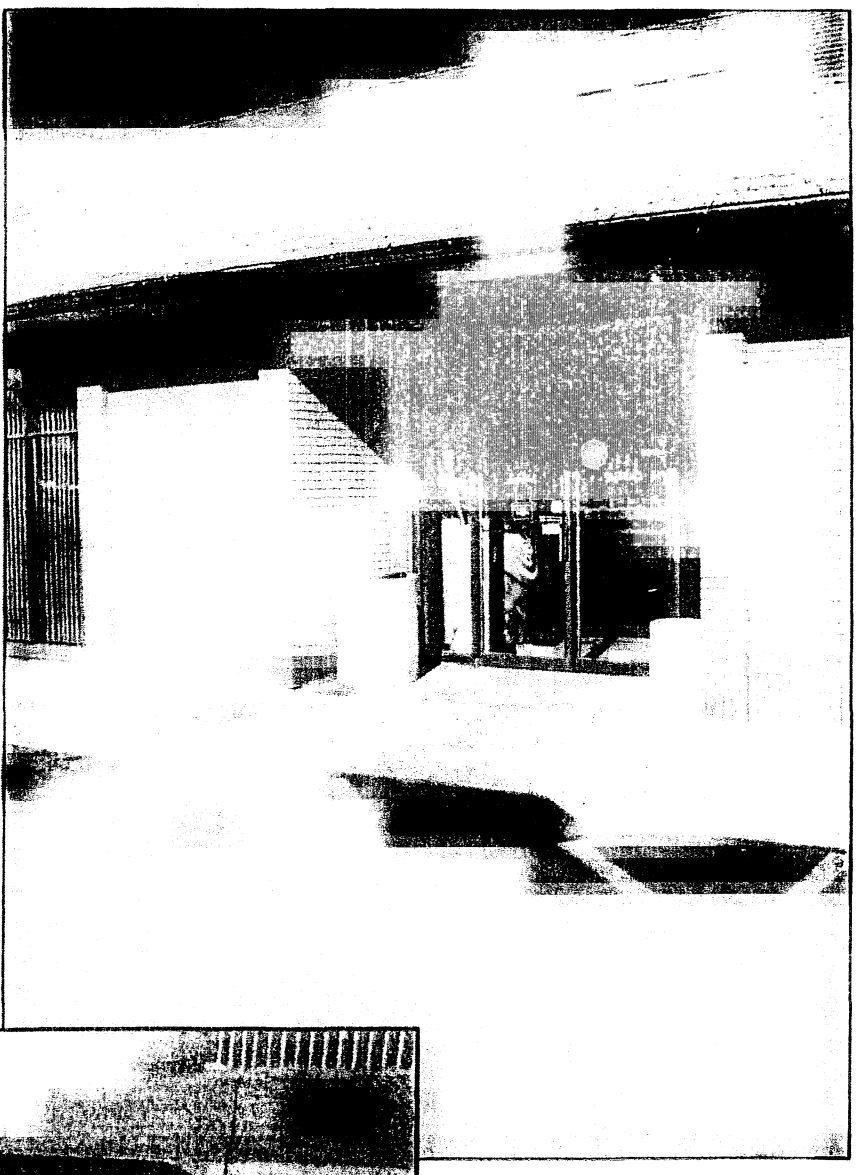


Granite Credit Union Site Photo Log
(C. Other Sidewalk trip hazards)

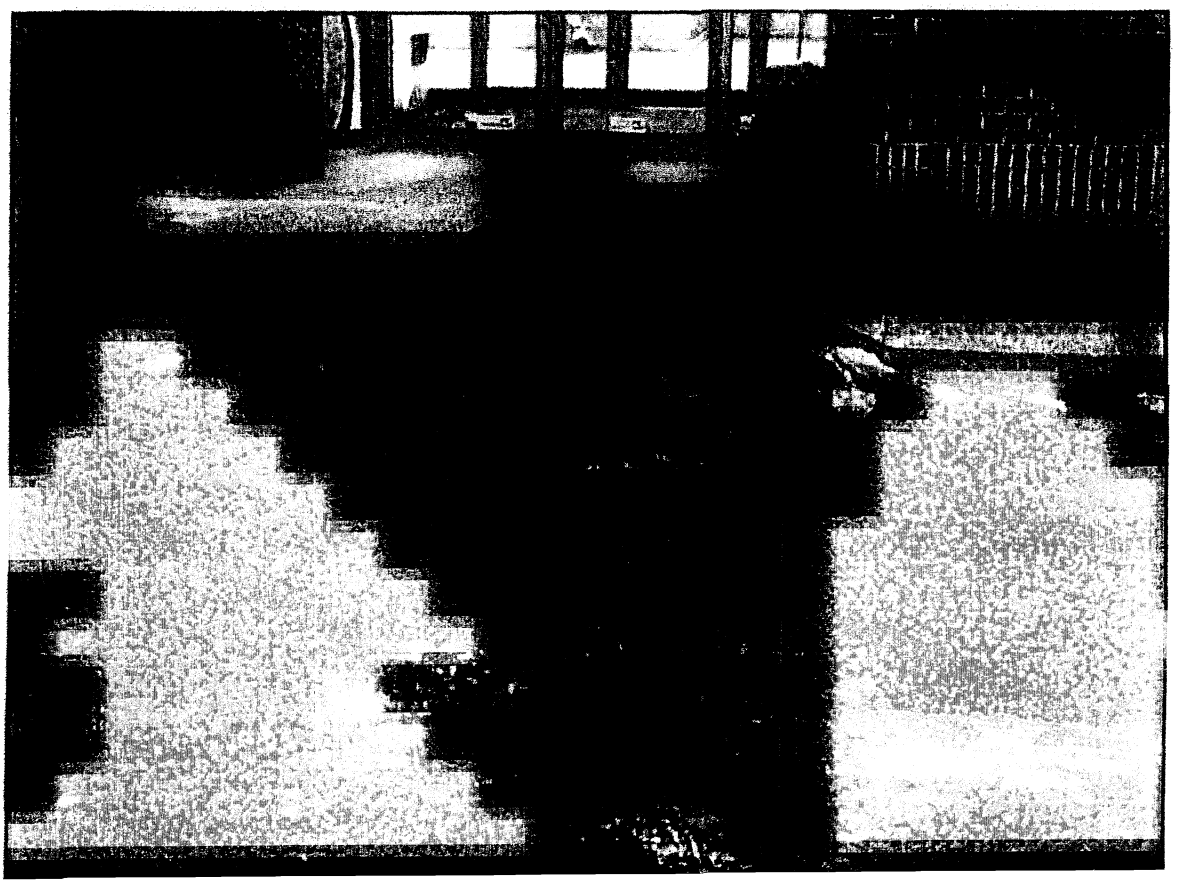


Granite Credit Union Site Photo Log
(C. Other Sidewalk trip hazards)

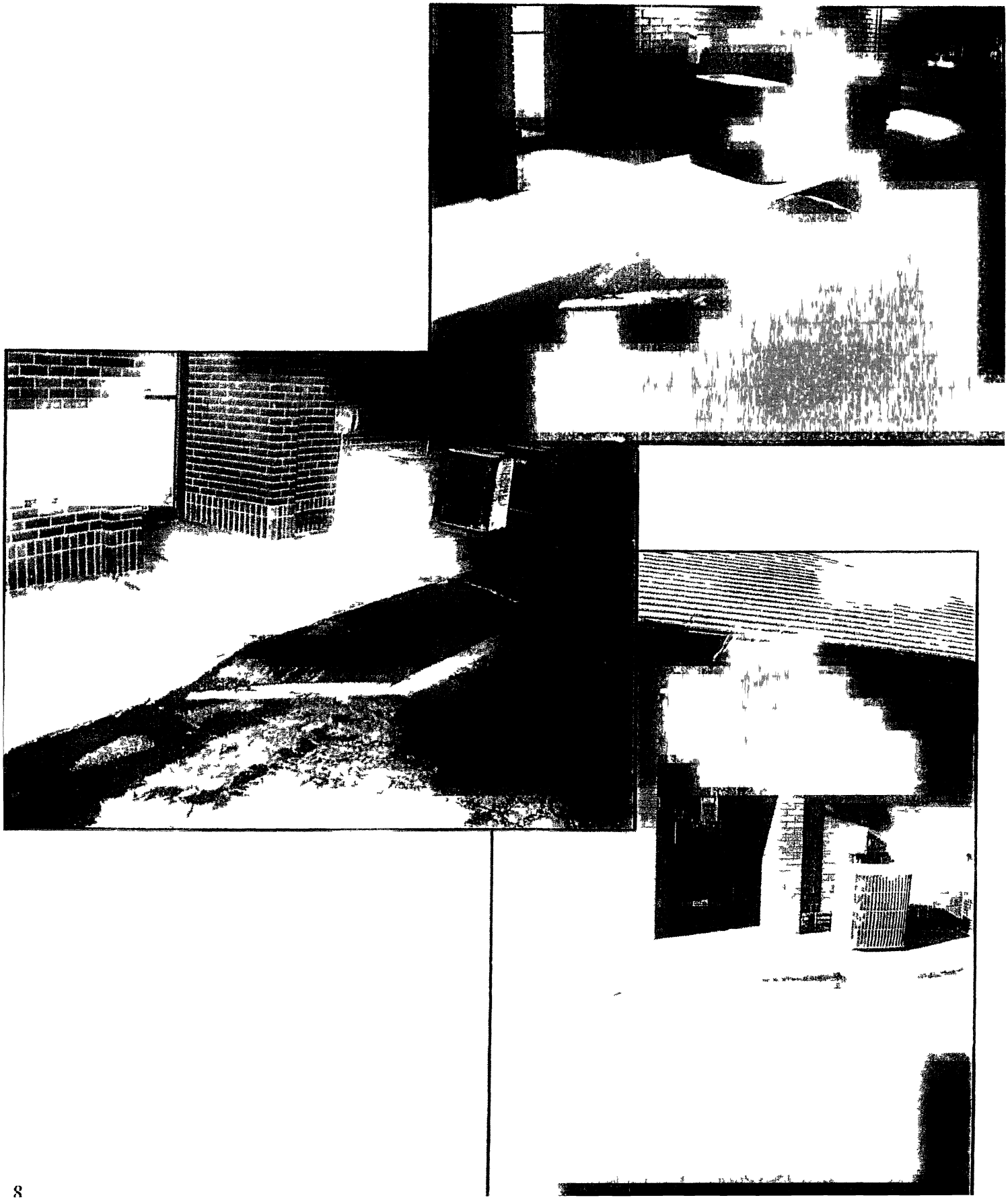
Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—South)



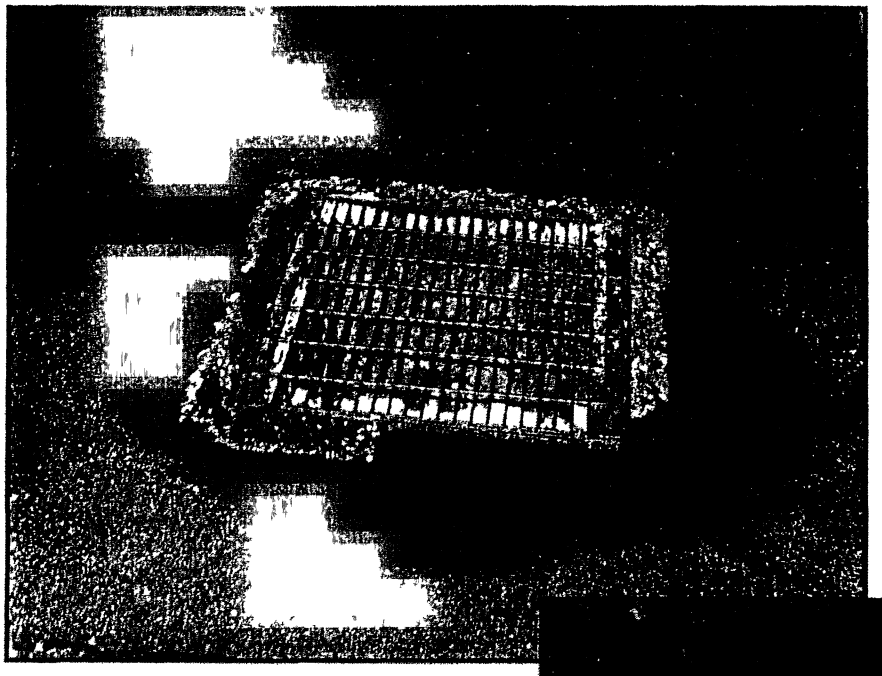
Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—South)

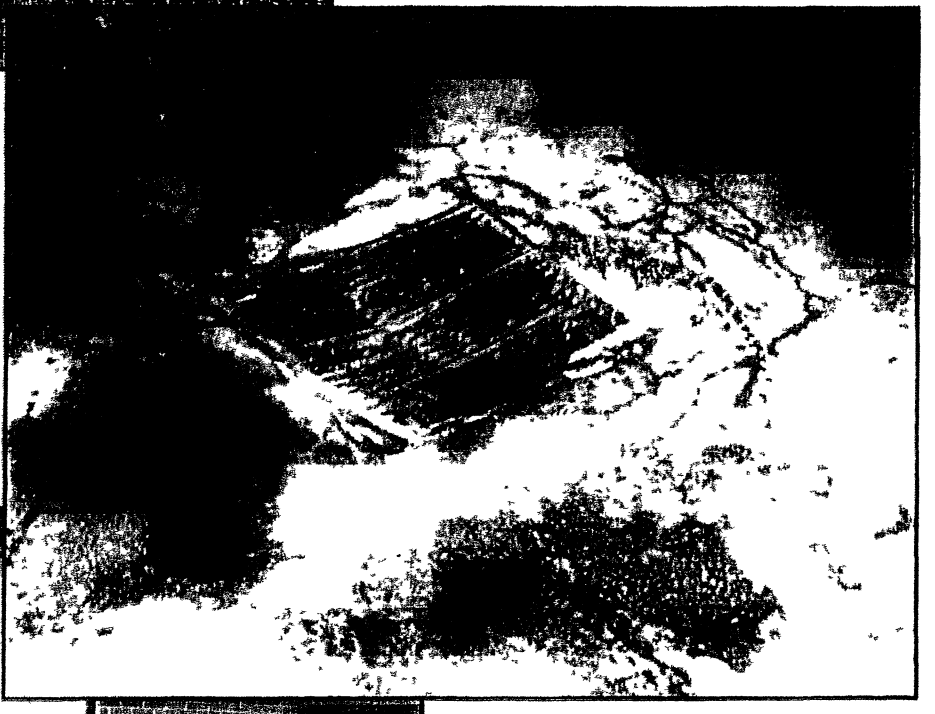


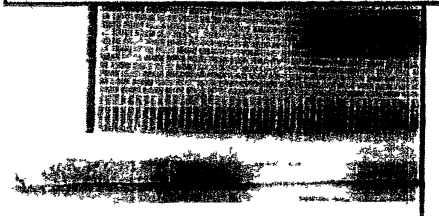
Granite Credit Union Site Photo Log
(D. Pedestrian Ramp—East)



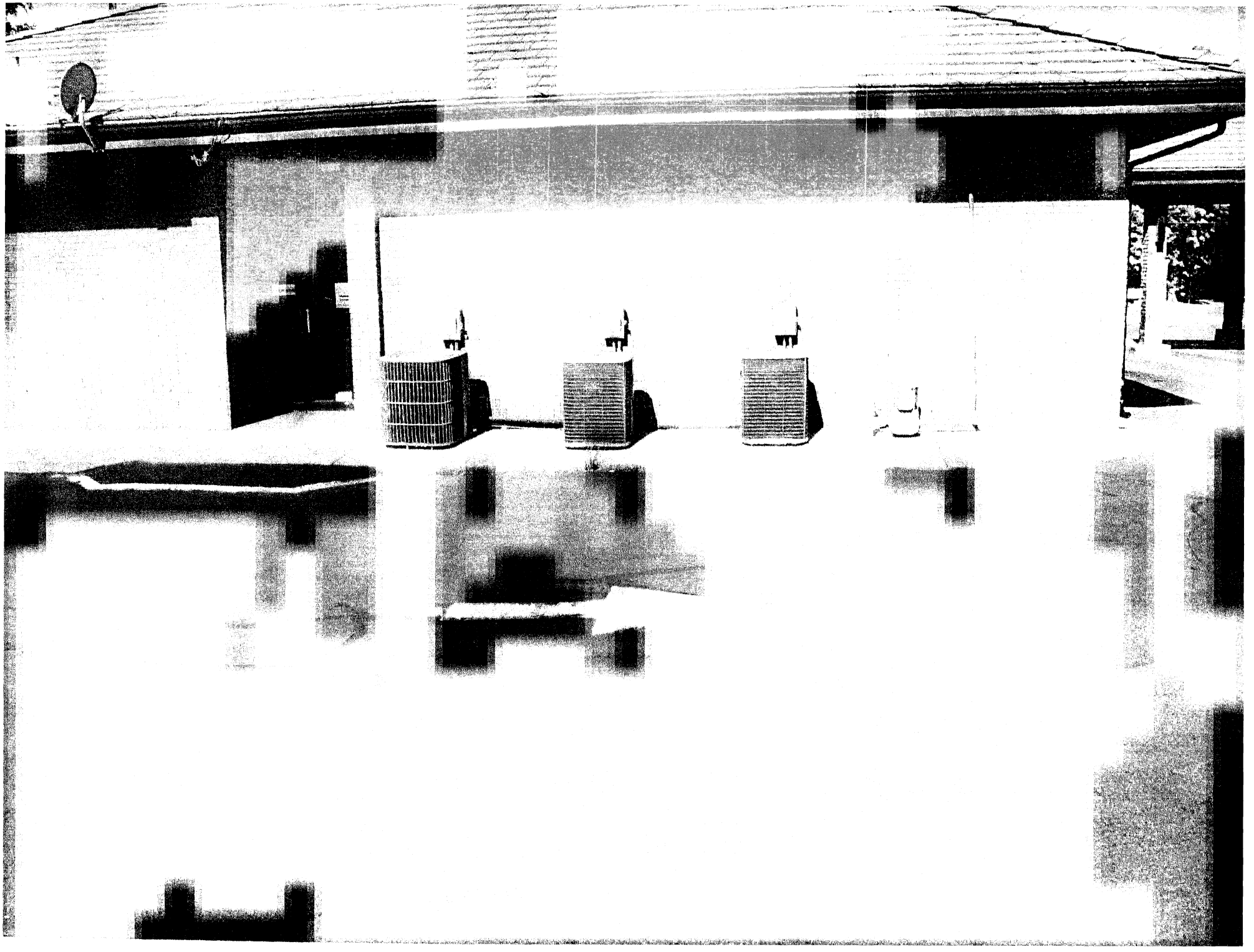
Granite Credit Union Site Photo Log
(E. Storm Drain Boxes and Roof Drains)







Granite Credit Union Site Photo Log
(E. Storm Drain Boxes and Roof Drains)



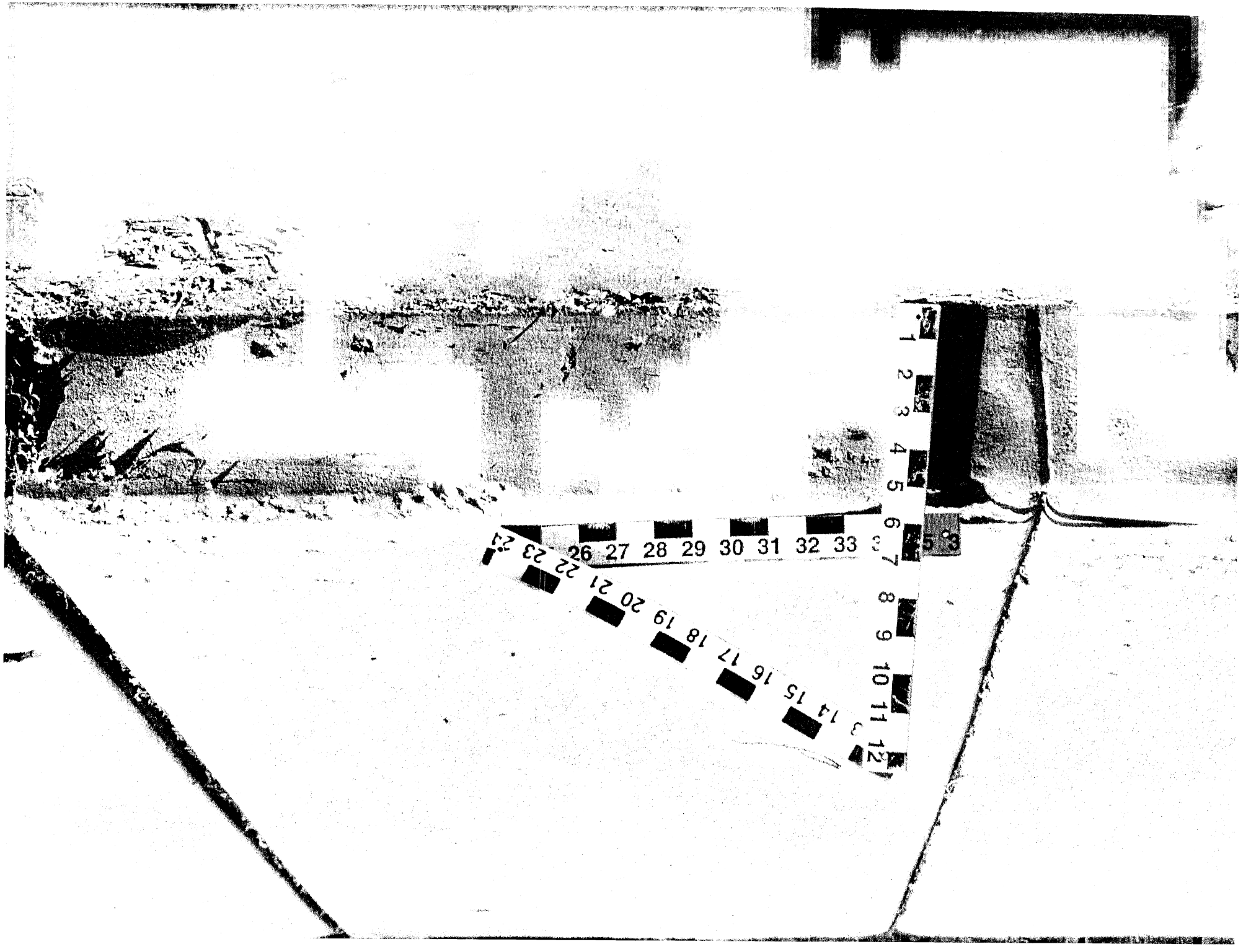


EXHIBIT A

CLARENCE S. KEMP, P.E.

EDUCATION

B.S.C.E., Brigham Young University, 1982
(Magna Cum Laude)

Professional Engineer, Colorado #37492
Professional Engineer, Wyoming #5480
Professional Engineer, Utah #4984482
Professional Engineer, Idaho #10676
Professional Engineer, Nevada #18617

American Water Works Association
Consulting Engineers Council
American Public Works Association

EXPER

1983 - Present	**FORSGREN ASSOCIATES, INC.** Project Manager / Division Manager
2001 – Present	City Engineer – City of Holladay, UT
1981 - 1983	CHICAGO BRIDGE AND IRON COMPANY
1980 - 1981	UTAH DEPARTMENT OF TRANSPORTATION

EXP

Mr. Kemp has nearly 30 years of "hands-on" experience in the planning, design, and construction of public infrastructure projects. This experience includes his streets and roads, pavements, storm drainage, water supply and distribution, wastewater collection, etc. In addition to his role as a design engineer and project manager, Mr. Kemp also functions in the role of City Engineer for five cities and multiple special districts in Utah and Wyoming.

SPECIF

Historic Restoration, Pedestrian, and Trails Projects

Mr. Kemp also has extensive experience with site development and public beautification projects. Most of this experience has involved municipal sponsorship or ownership. In many cases, historic preservation was a primary concern. A few projects which Mr. Kemp was directly responsible include:

- *Historic Union Center Master Plan - Evanston, Wyoming*
- *Historic South Main Street Beautification - Rock Springs, Wyoming*
- *Historic Rail Road Avenue Utilities and Beautification - Green River, Wyoming*
- *Centennial Subdivision Renovation - Evanston, Wyoming*
- *White Mountain Village Improvements - Rock Springs, Wyoming*
- *Sioux Drive Restoration - Evanston, Wyoming*

- *Forest Dale Golf Course - Salt Lake City, Utah*
- *AML Presidents Streets Utilities and Restoration - Rock Springs, Wyoming*
- *550 East Mill Creek Wetlands and Flood Control - Salt Lake County, Utah*
- *Bear River State Park - Wyoming State Parks and Historic Sites*
- *Town of Star Valley Ranch – Vista Drive entry way and trails,*
- *City of Holladay Historic Downtown "Village" Project, Holladay, Utah*
- *Holladay Boulevard Trails System Master Planning*
- *LaBarge, Wyoming Trails Project planning and design*
- *Cokeville, Wyoming Trials Environmental Clearances*

Streets and Sidewalks Projects

Mr. Kemp also has extensive experience with street maintenance, construction, and safe sidewalks projects. A few projects which Mr. Kemp was directly responsible include:

- **City of Holladay, UT Pavement Inventory and Management Plan**: This project included 93 miles of pavement inspection and documentation. Mr. Kemp authored a GIS inventory tool to allow for efficient data collection and analysis. Based on this work, the City authorized a $9 million bond for pavement work in 2009-2010. Mr. Kemp is the project manager for that work.
- **City of Marbleton Streets**. Mr. Kemp was responsible for the evaluation of 8 miles of failing streets in this small community. The resulting$ 8 million streets and drainage project was completed in late 2008.
- **City of Holladay, UT Safe Sidewalks Program:** In his role as City Engineer, Mr. Kemp was responsible for the inventory and evaluation of Holladay's sidewalks. The resulting study was the template for the city's safe sidewalk program focusing on schools and high pedestrian traffic areas. This project identified serious safety deficiencies and tripping hazards throughout the city. Mr. Kemp has been project manager on many sidewalk projects throughout the city resulting from this plan. One of the immediate outcomes of this study was an annualized program of trip hazard removal throughout the city.
- **Taylorsville, City, UT Pavement Management Plan:** Using the GIS template developed for Holladay, Mr. Kemp is working with the City of Taylorsville to develop a comprehensive pavement management plan.
- **Rock Springs, WY Presidents Streets Reconstruction:** Mr. Kemp was project manager for $5 million in streets reconstruction work in the Presidents Streets residential area. These projects were necessitated by mine subsidence problems. The project was awarded national recognition form the U.S. Department of Interior.
- **Safe Sidewalks – 2300 East (Lincoln to 4500 South)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the east side of 2300 East in Holladay. The project is specifically intended to address pedestrian safety concerns associated with Olympus High School on this busy traffic corridor.
- **Safe Sidewalks – Highland Drive (Cottonwood mall south to Oakwood Elementary School)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the east side of Highland Drive in Holladay. The project is specifically intended to address pedestrian safety concerns associated with Oakwood Elementary School located on this busy traffic corridor
- **Safe Sidewalks – Crestview Elementary School** – In his role as city engineer, Mr. Kemp was the city's project manager responsible for the UDOT funded section of sidewalk on 2000 East across from Crestview Elementary School. As part of the funding process, Mr. Kemp worked closely with the Granite School District to identify needs and help develop their "safe routes to school" program."
- **Safe Sidewalks – Cottonwood Elementary School** – In his role as city engineer, Mr. Kemp was the city's project manager responsible for the UDOT funded section of sidewalk on Holladay Blvd across from Cottonwood Elementary School. As part of the funding process, Mr. Kemp worked closely with the Granite School District to identify needs and help develop their "safe routes to school" program."
- **Safe Sidewalks – Murray-Holladay Road (Holladay Blvd. to Wander Lane)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the North Side of Murray Holladay Road.. The project is specifically intended to address pedestrian safety concerns associated with an existing church and school children using this route.

- **Safe Sidewalks – Murray-Holladay Road (Kings Row)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the South Side of Murray Holladay Road past the "Frisbee Park".. The project will address significant pedestrian safety concerns associated with the regional park along this busy road.

Municipal Engineering

Mr. Kemp's engineering background focuses heavily on municipal engineering. He understands the importance of public coordination, public safety, budgeting, funding, rate structure impacts, etc. He has been designated as the city engineer for many communities including:

- City of Holladay, Utah
- Town of Cokeville, Wyoming
- Town of Marbleton, Wyoming
- Town of LaBarge, Wyoming
- Town of Big Piney, Wyoming
- Town of Bear River, Wyoming
- Etna Water and Sewer District
- Freedom, Wyoming Water and Sewer District
- Bedford, Wyoming Water & Sewer District
- Town of Star Valley Ranch, Wyoming

In this role, Mr. Kemp is responsible for capital projects planning and design, pavement management, safe sidewalk programs, building department administration, etc. He has also authored design standards for many communities. He is also responsible for developmental reviews and staff approvals.

Storm Drainage Conveyance / Hydrology

Mr. Kemp has completed storm drain master plans for the cities of Malad, Idaho, and Sandy, Utah. He is experienced with accepted computer modeling such as SWMM, HEC-1, HEC-2, and STORM. In addition, he has authored software for detention basin flow routing and hydrologic calculations using the SCC or Denver unit hydrograph methods.

His experience includes the detailed design and construction of numerous rigid pipe and open channel conveyance facilities for the State of Wyoming, Utah DOT, Salt Lake County, Salt Lake City, and many other clients. These designs have required the optimization of pipe sizing, detention basins, pipeline materials analysis, and other cost saving measures. Specific projects for which Mr. Kemp was directly responsible include:

- Bear River Basin Planning Study - Wyoming Water Development Commission
- Evanston Storm Drainage Masterplan - Evanston, Wyoming
- Gateway Storm Drain - Salt Lake City, Utah
- Flat Iron Basin Master Plan - Salt Lake City, Utah
- 1300 East Master Plan - Salt Lake City, Utah
- Southwest Canal Study - Salt Lake City, Utah
- Mill Creek Channel Improvements - Salt Lake City, Utah
- 550 East Detention Basin - Salt Lake City, Utah
- City Creek Channel Restoration - Salt Lake County, Utah
- Forest Dale Golf Course/Detention Basins - Salt Lake County and City, Utah

- 1-215 Storm Drainage Calculations - Utah DOT
- 1st Avenue Area Storm Drain System - Evanston, Wyoming
- Morse Lee Area Storm Drain System - Evanston, Wyoming
- Bear River Channel Stabilization - Evanston, Wyoming
- Wayman Basin Storm Drain System, Holladay, Utah
- Holladay Storm Drain Master Plan, Holladay, Utah

RELATED PUBLICATIONS VELOCITY

1. City of Holladay Safe Sidewalk Management System. – 2003
2. Town of Marbleton, WY Pavement Management Plan – 2006
3. City of Holladay, UT Developmental Design Standards -2004
4. City of Bluffdale, UT Developmental Design Standards – 2003
5. City of Holladay, UT Building Department Standards – 2007
6. City of Kemmerer, WY Building Department Standards – 2007
7. Town of LaBarge, WY Building Department Standards and Ordinance – 2008
8. City of Holladay, UT sidewalk ordinance – 2006
9. City of Holladay, Street Cut Ordinances and Standards – 2008

CASES IN MR. TIFIED JANUARY 1995

-NONE-

EXHIBIT B

COMPENSATION

For purposes of preparing his report, reaching his expert witness conclusion, investigation, and testimony in deposition or at trial, in the present case, Mr. Kemp is compensated at the rate of $200. per hour.

For hands on construction design or supervision of Streets or Sidewalk Projects, Municipal Engineering, Storm Drainage Conveyance/Hydrology, or for the drafting of Municipal Safe Sidewalk and/or Safe building Ordinances or Municipal Safety Standards, his fees may vary, based upon a bid award system, made on behalf of Forsgren Associates.

QuickTime Player.lnk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered to Counsel as follows: Anthony C. Kaye and Matthew L. Moncur, 201 South State Street, Suite 800, Salt Lake City, UT 84111, on this 23rd day of September, 2009.

Earl S. Spafford

Tab 5

Earl S. Spafford, In Propria Persona
6026 Village III Road
Murray, UT 84121
Tele: (801) 278-5909
Cell: (801) 699-8474

Iris M. Spafford, In Propria Persona
6026 Village III Road
Murray, UT 84121
Tele: (801) 278-5909

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

IRIS M. SPAFFORD, and EARL S. SPAFFORD,	}	
Plaintiffs,		**AFFIDAVIT OF CLARENCE KEMP, B.C.S.E., P.E., and SENIOR PROJECT ENGINEER**
vs.	}	
GRANITE CREDIT UNION, Defendant.	}	Case No. 070911059
		Honorable Tyrone Medley

STATE OF UTAH }
}ss
COUNTYOF SALT LAKE }

1. I am over the age of 18 years of age and have personal knowledge of the matters stated herein.
2. I have worked as a Licensed Professional Engineer since 1988, and am currently employed at Forsgren Associates as a Senior Project Engineer. I have extensive "hands on" experience in the planning, design, and construction of public infrastructure systems. This experience includes sidewalks and the development of safe sidewalk programs, streets and roads, pavements, walkways, storm drainage,

water supply and distribution, etc. In addition to my role as a design engineer and project manager, I also function in the role of City Engineer for five cities and towns and multiple special districts in Utah and Wyoming.

3. I have been employed to testify in the above entitled matter on behalf of Earl S. Spafford and Iris M. Spafford. A true and correct copy of my curriculum vitae is attached hereto as Exhibit 'A'. I am uniquely qualified to testify in this matter.
4. I was retained by to determine if the premises involves some unsafe condition of a permanent nature upon the subject premises, which I inspected, known as 6799 S. 900 E., Midvale, UT.
5. I specifically looked for violations of ADA Statutory Violations, Code, and other building and design standards which are both accepted and required within the Building Industry. I was also asked to determine any lack of civil-site maintenance of the subject property, and sought to determine whether any of these conditions were dangerous and defective and whether such conditions may have played a role in the serious injuries sustained in a fall by Iris M. Spafford.
6. The site was first inspected by myself shortly after the accident, and again on December 1, 2006. It appears that no significant changes (pavement overlays, sidewalk and asphalt maintenance, sidewalk replacement, trip hazard removal, etc) had occurred during this time. The site remained virtually unchanged from the previous site visit. A copy of the site overview is attached to my Expert Report, as an attachment to Exhitit 'B'.
7. For the purpose of this affidavit, special emphasis will be placed upon the South East side of the building, where the injury occurred, despite the existence of ADA, Code, trip hazards, variable curb heights on the building perimeter sidewalk, and other multiple construction, design, and maintenance violations replete throughout the subject premises.

   I have interviewed Earl S. Spafford and Iris M. Spafford, am advised that on or about April 5, 2005, because all other stalls were taken, the Spaffords parked their vehicle on the last parking stall to the East, thereby allowing adequate room for Mrs. Spafford, to maneuver around the car in order to step upon the curb.

8. The sidewalk at this location is characterized by a variable curb height and is situated very close to a storm drain inlet with steep asphalt grades. This trip hazard was not (and is not) painted or otherwise marked to warn pedestrians.
9. The pedestrian sidewalk from 900 East Street (approaching from the west) was constructed with a 3-inch high step as a tie-in to the straight grades of the building perimeter sidewalk. This obvious trip hazard is not painted or otherwise marked to warn pedestrians. From a design standpoint, this step should have been eliminated in favor of a minimal sidewalk slope to match grades at this location.
10. Three additional sidewalk trip hazards were also noted at the time of my initial inspection, as approximately ¾" high. The APWA (*Reference Drawing 291 of APWA Manual of Standard Plans)* defines sidewalks with a vertical or horizontal displacement of ½" or more as defective, requiring replacement. These trip hazards are likely related to settlement, and had not been addressed or corrected at the time of my follow-up inspection approximately one year later. Granite Credit Union is, in my opinion, responsible for this hazardous condition by failing to maintain safe premises, and to properly safeguard against settling, and to properly maintain the ingress and egress to the building in a safe and prudent manner. Moreover, Granite Credit Union failed to eliminate or mitigate dangerous and defective conditions on the property, contributing to or causing Mrs. Spafford's serious injuries.
11. The site was designed to sheet drain across the parking lot pavement areas from the outside perimeter toward two drain inlets located south and southeast of the building as shown on the attached sketch. The building roof drains discharge directly into the parking lot where they also sheet flow into the inlets, raising concerns about icing, slick wet surfaces, and related pedestrian safety. It was also noted that the pavement has settled around the south drain inlet, thus raising the concrete inlet and grate ½-inch or more above the surrounding pavement, thus creating puddling, icing, and another potential pedestrian trip hazard for customers parked on the east side of the parking lot. The drain inlet box to the east has a badly damaged concave grate, similarly creating concerns relative to pedestrian safety. Again, it was noted in the follow-up inspection approximately on year later that Granite Credit Union failed to eliminate or mitigate these dangerous and defective conditions.

12. That the only access ramp to which the public as allowed to use, as entry to the lobby of the building is on the South side of the building. The south public access ramp has a slope of approximately 10%, slightly in excess of the 1:12 (8.3%) standard ADA ramp slope contained in the *Department of Justice ADA Standards for Accessible Design* (28 CFR part 36). This too constitutes a dangerous and defective condition.
13. That additional Code, design and maintenance violations occurred, as high as ¾ inches high in violation of APWA (*Reference drawing 291 of APWA Manual of Standard Plans)* which defines sidewalks with a vertical or horizontal displacement of 1/2 " or more as defective, thereby requiring replacement. Granite Credit Union's failure to maintain its walkways, including that on the Southeast section of the building, constitutes a dangerous and defective condition.
14. All of these defects, in my opinion, constitute a dangerous and defective condition. But for the condition of the defects complained or, arising out of both a defective design, and a failure by the landowner to properly maintain the premises, Mrs. Spafford would not otherwise have been injured.
15. In conclusion, the civil-site development appears to be "cookie cutter" in nature with the building's perimeter sidewalk matching the finish floor elevation of the building, without regard to other site restraints. The surrounding parking lot and sidewalk infrastructure appears to have been designed and constructed to primarily address surface drainage. Pedestrian safety appears to have been almost an afterthought of the design/construction process.
16. The parking lot is laid out to encourage pedestrian access to the building from virtually any path or direction, depending upon where one is parked. This is problematic from the standpoint of pedestrian safety due to the items discussed above including variable curb heights, sidewalk trip hazards, adverse grades on drainage outlets, etc. These construction related problems have been further aggravated by the lack of site maintenance.
17. It is my expert opinion that the subject premises, and specifically the site of Mrs. Spafford's fall, constitutes a permanent dangerous and defective condition, for which Granite Credit Union is responsible.

18. Further affiant sayeth naught.

DATED this 12 day of October, 2009.

Clarence Kemp, P.E.
Sr. Project Engineer

SUBSCRIBED AND SWORN to before me this 12th day of October, 2009.

Notary Public

My Commission Expires: 9/17/2010

TARA BARNES
NOTARY PUBLIC - STATE OF UTAH
370 EAST 500 SOUTH STE 200
SALT LAKE CITY UT 84111
My Comm. Exp. 09/17/2010

CLARENCE S. KEMP, P.E.

B.S.C.E., Brigham Young University, 1982
(Magna Cum Laude)

Professional Engineer, Colorado #37492
Professional Engineer, Wyoming #5480
Professional Engineer, Utah #4984482
Professional Engineer, Idaho #10676
Professional Engineer, Nevada #18617

American Water Works Association
Consulting Engineers Council
American Public Works Association

1983 - Present	**FORSGREN ASSOCIATES, INC.** Project Manager / Division Manager
2001 – Present	City Engineer – City of Holladay, UT
1981 - 1983	CHICAGO BRIDGE AND IRON COMPANY
1980 - 1981	UTAH DEPARTMENT OF TRANSPORTATION

Mr. Kemp has nearly 30 years of "hands-on" experience in the planning, design, and construction of public infrastructure projects. This experience includes his streets and roads, pavements, storm drainage, water supply and distribution, wastewater collection, etc. In addition to his role as a design engineer and project manager, Mr. Kemp also functions in the role of City Engineer for five cities and multiple special districts in Utah and Wyoming.

Historic Restoration, Pedestrian, and Trails Projects

Mr. Kemp also has extensive experience with site development and public beautification projects. Most of this experience has involved municipal sponsorship or ownership. In many cases, historic preservation was a primary concern. A few projects which Mr. Kemp was directly responsible include:

- *Historic Union Center Master Plan - Evanston, Wyoming*
- *Historic South Main Street Beautification - Rock Springs, Wyoming*
- *Historic Rail Road Avenue Utilities and Beautification - Green River, Wyoming*
- *Centennial Subdivision Renovation - Evanston, Wyoming*
- *White Mountain Village Improvements - Rock Springs, Wyoming*
- *Sioux Drive Restoration - Evanston, Wyoming*

- *Forest Dale Golf Course - Salt Lake City, Utah*
- *AML Presidents Streets Utilities and Restoration - Rock Springs, Wyoming*
- *550 East Mill Creek Wetlands and Flood Control - Salt Lake County, Utah*
- *Bear River State Park - Wyoming State Parks and Historic Sites*
- *Town of Star Valley Ranch – Vista Drive entry way and trails,*
- *City of Holladay Historic Downtown "Village" Project, Holladay, Utah*
- *Holladay Boulevard Trails System Master Planning*
- *LaBarge, Wyoming Trails Project planning and design*
- *Cokeville, Wyoming Trials Environmental Clearances*

Streets and Sidewalks Projects

Mr. Kemp also has extensive experience with street maintenance, construction, and safe sidewalks projects. A few projects which Mr. Kemp was directly responsible include:

- **City of Holladay, UT Pavement Inventory and Management Plan**: This project included 93 miles of pavement inspection and documentation. Mr. Kemp authored a GIS inventory tool to allow for efficient data collection and analysis. Based on this work, the City authorized a $9 million bond for pavement work in 2009-2010. Mr. Kemp is the project manager for that work.
- **City of Marbleton Streets**. Mr. Kemp was responsible for the evaluation of 8 miles of failing streets in this small community. The resulting$ 8 million streets and drainage project was completed in late 2008.
- **City of Holladay, UT Safe Sidewalks Program:** In his role as City Engineer, Mr. Kemp was responsible for the inventory and evaluation of Holladay's sidewalks. The resulting study was the template for the city's safe sidewalk program focusing on schools and high pedestrian traffic areas. This project identified serious safety deficiencies and tripping hazards throughout the city. Mr. Kemp has been project manager on many sidewalk projects throughout the city resulting from this plan. One of the immediate outcomes of this study was an annualized program of trip hazard removal throughout the city.
- **Taylorsville, City, UT Pavement Management Plan:** Using the GIS template developed for Holladay, Mr. Kemp is working with the City of Taylorsville to develop a comprehensive pavement management plan.
- **Rock Springs, WY Presidents Streets Reconstruction:** Mr. Kemp was project manager for $5 million in streets reconstruction work in the Presidents Streets residential area. These projects were necessitated by mine subsidence problems. The project was awarded national recognition form the U.S. Department of Interior.
- **Safe Sidewalks – 2300 East (Lincoln to 4500 South)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the east side of 2300 East in Holladay. The project is specifically intended to address pedestrian safety concerns associated with Olympus High School on this busy traffic corridor.
- **Safe Sidewalks – Highland Drive (Cottonwood mall south to Oakwood Elementary School)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the east side of Highland Drive in Holladay. The project is specifically intended to address pedestrian safety concerns associated with Oakwood Elementary School located on this busy traffic corridor
- **Safe Sidewalks – Crestview Elementary School** – In his role as city engineer, Mr. Kemp was the city's project manager responsible for the UDOT funded section of sidewalk on 2000 East across from Crestview Elementary School. As part of the funding process, Mr. Kemp worked closely with the Granite School District to identify needs and help develop their "safe routes to school" program."
- **Safe Sidewalks – Cottonwood Elementary School** – In his role as city engineer, Mr. Kemp was the city's project manager responsible for the UDOT funded section of sidewalk on Holladay Blvd across from Cottonwood Elementary School. As part of the funding process, Mr. Kemp worked closely with the Granite School District to identify needs and help develop their "safe routes to school" program."
- **Safe Sidewalks – Murray-Holladay Road (Holladay Blvd. to Wander Lane)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the North Side of Murray Holladay Road.. The project is specifically intended to address pedestrian safety concerns associated with an existing church and school children using this route.

- **Safe Sidewalks – Murray-Holladay Road (Kings Row)** - Mr. Kemp was the design engineer and project manager for this sidewalk project along the South Side of Murray Holladay Road past the "Frisbee Park".. The project will address significant pedestrian safety concerns associated with the regional park along this busy road.

Municipal Engineering

Mr. Kemp's engineering background focuses heavily on municipal engineering. He understands the importance of public coordination, public safety, budgeting, funding, rate structure impacts, etc. He has been designated as the city engineer for many communities including:

- City of Holladay, Utah
- Town of Cokeville, Wyoming
- Town of Marbleton, Wyoming
- Town of LaBarge, Wyoming
- Town of Big Piney, Wyoming
- Town of Bear River, Wyoming
- Etna Water and Sewer District
- Freedom, Wyoming Water and Sewer District
- Bedford, Wyoming Water & Sewer District
- Town of Star Valley Ranch, Wyoming

In this role, Mr. Kemp is responsible for capital projects planning and design, pavement management, safe sidewalk programs, building department administration, etc. He has also authored design standards for many communities. He is also responsible for developmental reviews and staff approvals.

Storm Drainage Conveyance / Hydrology

Mr. Kemp has completed storm drain master plans for the cities of Malad, Idaho, and Sandy, Utah. He is experienced with accepted computer modeling such as SWMM, HEC-1, HEC-2, and STORM. In addition, he has authored software for detention basin flow routing and hydrologic calculations using the SCC or Denver unit hydrograph methods.

His experience includes the detailed design and construction of numerous rigid pipe and open channel conveyance facilities for the State of Wyoming, Utah DOT, Salt Lake County, Salt Lake City, and many other clients. These designs have required the optimization of pipe sizing, detention basins, pipeline materials analysis, and other cost saving measures. Specific projects for which Mr. Kemp was directly responsible include:

- Bear River Basin Planning Study - Wyoming Water Development Commission
- Evanston Storm Drainage Masterplan - Evanston, Wyoming
- Gateway Storm Drain - Salt Lake City, Utah
- Flat Iron Basin Master Plan - Salt Lake City, Utah
- 1300 East Master Plan - Salt Lake City, Utah
- Southwest Canal Study - Salt Lake City, Utah
- Mill Creek Channel Improvements - Salt Lake City, Utah
- 550 East Detention Basin - Salt Lake City, Utah
- City Creek Channel Restoration - Salt Lake County, Utah
- Forest Dale Golf Course/Detention Basins - Salt Lake County and City, Utah

- 1-215 Storm Drainage Calculations - Utah DOT
- 1st Avenue Area Storm Drain System - Evanston, Wyoming
- Morse Lee Area Storm Drain System - Evanston, Wyoming
- Bear River Channel Stabilization - Evanston, Wyoming
- Wayman Basin Storm Drain System, Holladay, Utah
- Holladay Storm Drain Master Plan, Holladay, Utah

1. City of Holladay Safe Sidewalk Management System. – 2003
2. Town of Marbleton, WY Pavement Management Plan – 2006
3. City of Holladay, UT Developmental Design Standards -2004
4. City of Bluffdale, UT Developmental Design Standards – 2003
5. City of Holladay, UT Building Department Standards – 2007
6. City of Kemmerer, WY Building Department Standards – 2007
7. Town of LaBarge, WY Building Department Standards and Ordinance – 2008
8. City of Holladay, UT sidewalk ordinance – 2006
9. City of Holladay, Street Cut Ordinances and Standards – 2008

-NONE-

Tab 6

Anthony C. Kaye (#8611)
Matthew L. Moncur (#9894)
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Attorneys for Defendant Granite Credit Union

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

IRIS M. SPAFFORD AND EARL S. SPAFFORD, **Plaintiffs,** **vs.** **GRANITE CREDIT UNION,** **Defendant.**	**AFFIDAVIT OF LARRY SMILTNEEK, MS, PSE** **Case No. 070911059** **Honorable Tyrone Medley**

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

1. I am over the age of eighteen and have personal knowledge of the matters stated herein.

2. I am presently employed as an engineer for MRA Forensic Sciences ("MRA") and have been retained as an expert witness in this matter by Defendant Granite Credit Union ("GCU"). A true and correct copy of my curriculum vitae is attached hereto as Exhibit A.

3. I was retained as an expert by GCU to provide expert testimony with respect to the design and condition of the GCU property located at 6799 S. 900 E., Midvale, Utah (the "Property") and to provide my expert opinion as to whether the design and condition of the Property were dangerous and defective and whether such conditions played any role in the alleged fall of Iris M. Spafford ("Ms. Spafford") on or about April 4, 2005.

4. On February 15, 2008, I personally inspected the Property. In addition, I have reviewed the Complaint in this matter and various other documents.

5. As an expert in engineering and accident investigation I have reached conclusions with respect to the condition of the Property and the cause of Ms. Spafford's alleged fall. A true and correct copy of the expert report that I prepared in this matter is attached hereto as Exhibit B.

6. While paragraph 11 of the Complaint alleges that Ms. Spafford "had" to step up the east facing curb because there was not enough room for her to step up the south curb. Ms. Spafford would have had adequate room to step up on the south side of the building if Mr. Spafford had parked further away from the curb.

7. Even with Mr. Spafford having parked close to the south curb, Ms. Spafford had numerous alternate routes available and did not have to attempt to ascend the east curb. For example, she could have walked around the back of the car to reach the wheelchair accessible ramp outside the south entrance, less than twenty feet from the Spaffords' car. Or, Ms. Spafford could have continued walking along the east curb to the ramp outside the east entrance. Alternately, Mrs. Spafford could have been dropped off outside the building's south entrance

before the car was parked. These alternatives were not used, and instead Ms. Spafford chose to attempt to step up the east curb.

8. Plaintiffs' allegation in Paragraph 12 of the Complaint that "the curb is unmarked and is dangerous in that it is uneven" is simply untrue. In fact, measurements with a digital level showed that the top of the curb and the sidewalk beyond were on average within a fraction of one degree of being level.

9. Plaintiffs' allegation in paragraph 12 of the Complaint that "when one is trying to step up onto the curb the left foot must step up higher than the right foot by several inches" greatly mischaracterizes the condition of the substantially level curb and sidewalk; a level surface has the same elevation all over. A person stepping up the curb would simply have to raise the second foot to the level of the first.

10. Plaintiffs' allegation in paragraph 12 of the Complaint that "the curb quickly begins to slant downward towards the building" is also inaccurate; the sidewalk is nearly perfectly level. This is not defective or dangerous; this is the normal and expected condition of a curb and sidewalk.

11. The allegation made in paragraph 13 of the Complaint that "in addition a drain is located a few feet southeast of the sidewalk area in the parking lot and the asphalt around the drain slants downward toward the drain to allow the water to flow into the drain" and that this sloped pavement requires additional effort to walk up does not indicate the existence of any dangerous or defective condition at the Property.

12. My measurements determined that the drain's nearest point was seven feet four inches east of the east curb edge and one foot seven inches south of the south curb edge. The pavement does slope toward the drain, as it must for water to flow to the drain, and this does not represent a dangerous or defective condition.

13. I observed many persons walking toward and stepping up the curb at the location of Ms. Spafford's alleged fall during my inspection of the property. None showed any sign of hesitation or difficulty. Each simply approached the curb, stepped up, and moved on.

14. While there are variable elevation differences between the parking lot pavement and the sidewalk at the property, ranging between two and nine inches, such changes are gradual as one moves along the curb/sidewalk edge, particularly in the area of Ms. Spafford's alleged fall.

15. The southeast curb/sidewalk corner measured about eight and three-quarters inches tall. Measured six inches north of the corner, the east curb face was about eight inches tall. Six inches further along, the curb was still eight inches tall. Four feet north of the corner the curb height was seven and one-half inches, varying only one-half inch in three feet.

16. An eight inch curb is not remarkably tall. Stair step riser heights of seven and three-quarters inches are commonly found. Thus, the height of the curb that Plaintiffs' contend caused Ms. Spafford's fall was about the same height as an ordinary step.

17. Even more importantly, the fact that the top of the curb in the area of Ms. Spafford's alleged fall is substantially level indicates that the curb in that area is neither dangerous nor defective.

18. Plaintiff alleges in paragraph 14 of the Complaint that "Ms. Spafford attempted to step up onto the eastside curb of the sidewalk with her right foot. As she went to lift her left foot, she did not get her foot up completely onto the higher part of the curb. Ms. Spafford lost her balance and fell backward towards the drain hitting her head on the asphalt of the parking lot." This statement indicates that Ms. Spafford was unable to raise her left foot to the height of her right foot which she had successfully placed on top of the level curb.

19. Mrs. Spafford's backward fall indicated that she had no forward momentum; otherwise she would have fallen forward. Together, these things show that Ms. Spafford labored to step up onto the curb, and was physically unable to complete the step, suggesting that her fall was caused by something in her own physical condition, and not by the condition of the pavement, curb, and sidewalk at the Property.

20. The asphalt pavement, curb and sidewalk features encountered by Ms. Spafford as she made her way to the credit union building were not in violation of building code requirements, nor were they dangerous or defective.

DATED this 19 day of August 2009.

LARRY SMILTNEEK, MS, PSE

SUBSCRIBED AND SWORN to before me this 19 day of August 2009.

NOTARY PUBLIC

My Commission Expires:

10/22/2012

FELINA D. CORDOVA
Notary Public
State of Utah
Comm. No. 576096
My Comm. Expires Oct 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **AFFIDAVIT OF LARRY SMILTNEEK, MS, PSE** was served to the following this 19th day of August, 2009, in the manner set forth below:

[ ] Hand Delivery

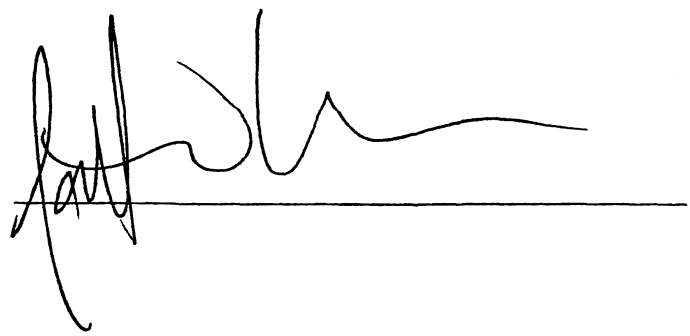
[X] U.S. Mail, postage prepaid

[ ] Federal Express

[ ] Certified Mail, Receipt No. _____, return receipt requested

Iris M. Spafford
6026 Village III Road
Murray, UT 84121

Earl S. Spafford
6026 Village III Road
Murray, UT 84121



CURRICULUM VITAE
Larry Smiltneek, M.S., P.E.
3/9/2009

SPECIALTIES:
Mechanical and Electrical Forensic Investigations. Failure Analysis and Accident Investigation. Structural Analysis and Design. Mechanical System Design and Prototype Fabrication. Instrumentation and Testing.

EDUCATION:
MSME 6/2003 University of Utah; Majored in Machinery Design, Special Interest: Stress Analysis and Fracture Mechanics.
BSME 6/1994 University of Utah.

MEMBERSHIPS:
SAE, ASME

LICENSURE - ACCREDIDATION:
State of Utah Professional Structural Engineer #265646-2203.
ACTAR – traffic accident reconstruction – Reg# 2032.

EMPLOYMENT:
7/94 - Present: Engineer MRA Forensic Sciences. Investigate residential and light commercial construction and component related issues including those involving soils, foundations, floors, walls, roofs, HVAC systems and plumbing. Inspect and develop repair plans for damaged buildings. Investigate failures of residential and commercial appliances, including those that result in fire. Investigate failures of a wide range of machines and mechanisms including pumps, heaters, automatic gates, doors and locking systems. Investigate vehicle crashes including and those that involve single and multiple cars and motorcycles. Cases range from low speed rear end collisions of light vehicles to those that involve heavy commercial vehicles at high speeds. Analyze lock/ignition systems of stolen recovered vehicles. Have designed and built custom instrumentation systems and test apparatus, including systems for testing structures and machines. Examples include apparatus for sensing steering angle, measuring brake pressures, and measuring vibration levels.

9/2003 - Present: Owner LS Engineering, Inc., Design and build special machinery including material handling "under hook" attachments, wheelchair deck lift and entertainment type rides. Developed sit-stand modifications for electric wheelchair. Produce prototype parts to customer specifications.

1/02 - 6/04: Research Assistant University of Utah Mechanical Engineering Department. Performed research on fatigue strength of aircraft aluminum materials. Designed, built, and operated a hydraulically actuated metal fatigue test machine for use within a scanning electron microscope.

9/94 - 9/97: Partner K-Tronics, Inc., Involved in design, test, and manufacturing of solid-state controllers for electromagnetic brake retarder. Also developed line of associated hand control and brake pedal control devices. Sold partnership position for royalties.

9/92 - 7/94: Research Assistant University of Utah Mechanical Engineering Department. Participated in research of vehicle dynamics and control. Member of team that designed and built an advanced brake research vehicle.

6/75 – 9/88: Employee Techwood Inc. (now Uniplex, Inc.), Wisconsin based machinery design and manufacturing company. Duties included machinist, design consultant, project manager, customer relations.

PUBLICATIONS:

JOURNAL PUBLICATIONS:

1. Smiltneek, L., "2D Photogrammetry for Accident Scene Documentation" Utah State Trooper, Volume 7, No. 1, Spring 2000
2. Smiltneek, L., "Single Cylinder Approach for In-situ Study of Fatigue Cracks", Master's Thesis, University of Utah, May 2003
3. Smiltneek, L, Shinde, S.R., Hoeppner, D.W., "Single cylinder in situ Scanning Electron Microscope Fatigue System", Review of Scientific Instruments, 77, 015104, 2006

PATENTS:

1. Kimbrough, S., Henderson, R., and Smiltneek, L., "Electromagnetic Retarder Control Apparatus and Method", Patent Number 5,743,599, Issued 4/28/98

MRA FORENSIC SCIENCES

FEE SCHEDULE and POLICIES

As of December 1, 2008

	Non-testifying activities	Depositions & other testimonies
Larry Smiltneek, M.S., P.E.	$170.00 per hour	$220.00 per hour

The non-testifying rate is for the following services: case work up, testing, reconstruction, analysis, meetings and travel time.

Case Set-up Fee: Applies to cases that are sent without materials necessary to accomplish assignment. $480.00. NON-REFUNDABLE six months after date received. If work begins prior to the six month date, the fee will be applied to work accomplished.

Retainer: NON-REFUNDABLE. We do not consider ourselves retained until the payment is received. Retainers are required upon request.

Automobile Fees: Mileage will be charged for any travel in reference to the case at **.70 cents** per mile.

Printing and Production Fees: Printing of case file materials.

Color Prints - $1.00/page B & W Prints & Copies - $0.10/page

CD - $10 VHS - $15 DVD - $20

Administration Fees are $35/hr. Applicable on projects requiring 30 minutes or more.

Travel Fees (if applicable): Airfare, Hotel, Meals & Mileage, etc. Please note NON-REFUNDABLE Airfare will be charged to the client if travel is canceled.

Deposition Fees: 2 Hours minimum of deposition time **PRE-PAID** is required. Additional time and/or expenses will be invoiced.

Cancellation Policy: [scheduling/reserving a date for TRIAL, HEARING, ARBITRATION, MEDIATION or DEPOSITION Testimony]

Cancellations less than **6 Working Days** before scheduled testimony date **$500.00 plus** incurred hours & expenses.

A **service charge of 1½% per month** is charged on the unpaid balance of **all** accounts that are **30 days** or older. Statements are sent on a monthly basis.

We would like to avoid any unnecessary costs, as would you, so if there are any changes in the status of the TRIAL, HEARING, ARBITRATION, MEDIATION or DEPOSITION, please notify us as soon as possible. If you have any questions, regarding this letter, please call.

TAX ID #: 87-0431453, for corporate name: Motion Research Associates, Inc.

125 W. Burton, Salt Lake City, UT 84115 (801)-746-1145 ph. (801)-746-1170 fax.
800-747-6820 toll free

Cases Larry Smiltneek has testified in either a deposition or a trial
since January 1, 1996

5/16/07

	CASE NAME	DEPO DATE	TRIAL DATE	VENUE
2680	Clarence Vincent v. Construction Rental & Supply	10/10/96		
3183	Gilda Cecilia Lythgoe v. Katherine & Edward McAvc	6/4/98		4th District Court of Utah County, State of Utah
3772	Ranae Neely v. Steve Bennett		3/1/00	3rd District Court, Salt Lake County, State of Utah
	Miguel Perez, et al. v. Tommy R. Perdue	11/2/99		District Court, Clark County, State of Nevada
B289	Property Casualty Insurance Co. of Hartford v. Gray I	5/1/2009		District Court, Jefferson County, Colorado
	Norman Stevens v. American Hood Systems, Inc.	4/27/2009		2nd Judicial District Court, Weber County, State of Utah

Tab 7

Earl S. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909
Cellular: (801) 699-8474

Iris M. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909

**IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH**

IRIS M. SPAFFORD, and EARL S. SPAFFORD	}	**PLAINTIFFS' MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
Plaintiffs,	}	
	}	
vs.	}	
GRANITE CREDIT UNION, A Utah Corporation,	}	Case No. 070911059
Defendants.	}	**Judge Tyrone Medley**

TABLE OF AUTHORITIES

Exhibits

Case Law

Statutes and Regulations

Earl S. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909
Cellular: (801) 699-8474

Iris M. Spafford
In Propria Persona
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909

**IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH**

IRIS M. SPAFFORD, and EARL S. SPAFFORD	}	**PLAINTIFFS' MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
Plaintiffs,	}	
	}	
vs.	}	
GRANITE CREDIT UNION, A Utah Corporation,	}	Case No. 070911059
Defendants.	}	**Judge Tyrone Medley**

COMES NOW THE PLAINTIFFS, Earl S. Spafford and Iris M. Spafford, In Propria Persona, pursuant to Utah R. Civ. P. 56, to submit the following Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment. A careful review of

this memorandum and its supporting exhibits will clearly demonstrate that there are disputed issues of material fact and judgment cannot be entered as a matter of law.

INTRODUCTION

At the outset, plaintiffs urge the court to:

a). recognize that plaintiff is entitled to all competing inferences in their favor in determining whether there is a material issue of fact which then precludes summary judgment;

b). recognize that, in fall cases, there are two alternative theory of recovery under Utah Law. Before the Court is the theory that the conduct of the defendant, in allowing a permanent defective and dangerous condition to exist, in and of itself, creates a foreseeable risk of harm. For such cases, actual or constructive notice is not an element of proof;

c). recognize that when testimony is within the common knowledge of laypersons, expert testimony is not required;

d). recognize that the court may take judicial notice of statutes or regulations defining what is defective;

e). recognize that defendant's expert, Larry Smiltneek, lacks the proper credentials to testify as a civil or structural engineer, as he is a mechanical engineer, and his experience and training are limited to equipment failure, and equipment related issues only. Accordingly, any testimony given by Mr. Smiltneek is based upon false assumptions for which he lacks the skill and training to testify, and constitutes inadmissible hearsay. At the very least, it should go to the weight of his testimony if the court allows it into evidence; and

f). recognize that the Court has considerable discretion to determine whether a particular expert is qualified and whether particular testimony would be helpful and suitable in a particular case.

STANDARD OF REVIEW

It is well settled under Utah Law, that "Plaintiff is entitled to all reasonable inferences in determining whether there is a material issue of fact which precludes summary judgment." *Silcox v. Skaggs Alpha Beta, Inc.*, 814 P.2d 623, 625 (Utah App. 1991).

And there is a second standard of review exercised by Utah Courts in negligence cases:

> We note that summary judgment should be granted with great caution where negligence is alleged. *Apache Tank Lines v. Cheney,* 706 P.2d 614, 615 (Utah 1995); This is because "[i]ssues of negligence ordinarily present questions of fact to be resolved by the fact finder." *Id.* "It is only when the facts are undisputed and but one reasonable conclusion can be drawn therefrom that such issues become questions of law." *Id.* Accordingly, summary judgment is reserved for only the most clear-cut negligence cases. *Ingram v. Salt Lake City,* 733 P.2d 126, 126 (Utah 1987) (per curiam); as cited in *English v. Kienke,* 774 P.2d 1154, 1156 (Utah App. 1989).

Plaintiffs submit that upon a reading of the competing testimony and the reasonable inferences that arise therefrom, when construed in plaintiffs' favor, particularly in this negligence action, defendants motion should be denied in its entirety.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendants statement of undisputed material facts is agreed to by the plaintiffs, however, plaintiffs would like to add the following
2. On or about April 5, 2005, plaintiff Iris Spafford ("Mrs Spafford)" was severely injured in a fall that occurred on the subject premises known as Granite Credit Union, 6799 S. 900 E., Midvale, Utah.
3. Defendant had control of the premises including the parking lot adjacent to the credit union. *Plaintiffs' Complaint,* para. 6; *Deposition of Curtis Doman,* p. 6, lines 16-20 (Exhibit '5').
4. Earl and Iris Spafford pulled into the South side of the credit union parking lot and parked in the last parking stall farthest to the east corner of the building, as it was the only remaining stall closest to the building.

5. Mrs. Spafford got out of the passenger side of the car and walked to reach the corner of the credit union's most southerly mode of ingress and egress. *Affidavit of Earl Spafford,* para. 3.
6. It is undisputed that plaintiffs have *alleged* the existence of 'construction and design defects' in the parking lot at the Property and that GCU "negligently and carelessly permitted the parking lot and on the curb to become and remain in a defective and dangerous condition. *Defendant's Memorandum,* para. 4, citing *Plaintiff's complaint,* para 14-21.
7. It is undisputed that Curtis Lynn Doman, CEO for Granite, conducted periodic inspections of the property, at least twice per year, to address repair and maintenance of the subject property. *Doman Deposition,* p. 13, lines 11-25; p. 14 lines 1-23; Exhibit 5.

MATERIAL FACTS IN DISPUTE

Pursuant to U. R Civ Proc 7(c) (3)(B), and in the interest of clarity, to the extent plaintiffs dispute an issue of fact, plaintiffs will provide a verbatim restatement of each of the moving party's facts that are controverted, and will follow the numbered paragraphs as they correspond to the defendant's moving papers:

8. "No modifications or changes have been made to the parking area or the sidewalk/curb area of the Property since the date of Ms. Spafford's alleged fall"

Plaintiffs' Response:

Granite Credit Union made modifications to the asphalt during its ownership of the property. As stated by Curtis Lynn Doman, CEO: "A. I don't know and – don't know what we've done to find additional repairs. I'm not aware of any repairs except asphalt replacement kinds of things." *Doman Deposition,* p. 33, line 25; p. 34, lines 1, 2. (Exhibit '5').

11. "Mr. Smiltneek also analyzed various documents, including the Complaint in this case, and, as an expert in engineering and accident investigation has concluded that GCU

did not breach any duty owed to Mrs Spafford, that the Property is not in defective or dangerous condition, and that the pavement, curb, sidewalk of the property did not cause Mrs Spafford's alleged injuries"

Plaintiffs' Response:

There is a material dispute of fact, between the parties, as they are in disagreement as to the precise variable heights of the curb when measured from the asphalt to the top of the curb According to the lay testimony of Earl S Spafford "On September 3, 2009, I took occasion to take a measuring tape and measure the heights of the step where Iris fell and the step to the far west and far north I found the step to the east corner of the building to be five and one quarter inches from the parking lot to the sidewalk I found the step to the east corner of the building to be five and three quarter inches from the parking lot to the sidewalk The step where Iris fell was seven and three quarter inches high, badly deteriorated from lack of maintenance on the leading edge " *Id.* para 9 (Exhibit '4')

Clarence Kemp testified in his affidavit that "The east sidewalk constituted a trip hazard, as it was constructed with a 3 inch high steep as a tie in to the straight grades of the building perimeter sidewalk This obvious trip hazard was not, nor is now, painted or otherwise marked to warn pedestrians From a design and ADA standpoint, this step should have been eliminated in favor of a minimal sidewalk slope to match grades at this location " *Kemp Affidavit,* para 9, (Exhibit '3')

Mr Kemp concludes by stating Three additional sidewalk trip hazards were also noted, as approximately ¾ inches high The APWA *(Reference Drawing 291 of APWA Manual of Standard Plans)* defines sidewalks with a vertical or horizontal displacement of ½ inch or more as defective and Granite Credit Union is responsible for this hazardous condition by failing to maintain safe premises, and to properly safeguard against settling, and to properly maintain the ingress and egress to the building in a safe and prudent manner **Moreover, Granite Credit Union failed to eliminate or mitigate dangerous and defective conditions on the property, contributing to or causing Mrs. Spafford's injuries."** *Kemp Affidavit,* para 10 (emphasis added)

Plaintiffs submit that the Court should take judicial notice of the violation of the APWA *(Reference Drawing 291 of APWA Manual of Standard Plans)* in finding a defective condition. *Accord, Brigham City v. Valencia,* 779 P.2d 1149, 1150 (Utah App. 1989) (The trial court acted properly in taking judicial notice of a Brigham City Building Ordinance).

12. "While paragraph 11 of the Complaint alleges that Mrs. Spafford "had" to step up the east facing curb because there was not enough room for her to step up on the south curb, Mrs. Spafford would have had adequate room to step up on the south side of the building if Mr. Spafford had parked further away from the curb".

Plaintiffs' Response:

"I was sitting in my car listening to the radio and watching Iris while Iris did our banking. I was properly parked in a marked parking stall located at the South East corner of the building, and Iris took the shortest route to the Credit Union, as it was otherwise unmarked and traffic around the perimeter was heavy." Earl Spafford, *Affidavit,* para. 2.

13. "Even with Mrs. Spafford having parked close to the south curb, Mrs. Spafford had numerous alternate routes and did not have to attempt to ascend the east curb. For example, she could have walked around the back of the car to reach the wheelchair accessible ramp outside the south entrance, less than twenty feet from the Spafford's car. Or, Mrs. Spafford could have continued walking along the east curb to the ramp outside the east entrance. Alternately, Mrs. Spafford could have been dropped off outside the building's south entrance before the car was parked. These alternatives were not used, and instead Mrs. Spafford's chose to attempt to step up the east curb".

Plaintiff's Response:

This issue of material fact was placed in dispute by expert witness Clarence Kemp, who summarized: "The parking lot is laid out to encourage pedestrian access to the building from virtually any path or direction, depending upon where one is parked. This is problematic from the standpoint of pedestrian safety due to the items

discussed above including variable curb heights, sidewalk trip hazards, adverse grades on drainage outlets, etc. These construction related problems have been further aggravated by the lack of site maintenance". Kemp *Affidavit,* para. 16.

And as stated above by Earl Spafford: "I was sitting in my car listening to the radio and watching Iris while Iris did our banking. I was properly parked in a marked parking stall located at the South East corner of the building, and Iris took the shortest route to the Credit Union, as it was otherwise unmarked and traffic around the perimeter was heavy." Earl Spafford, *Affidavit,* para. 2.

14. "Plaintiffs' allegation in paragraph 12 of the Complaint that "the curb is unmarked and is dangerous in that it is uneven" is simply untrue. In fact, measurements with a digital level showed that the top of the curb and sidewalk beyond were on average within a fraction of one degree of being level".

15. "Plaintiffs' allegation in paragraph 12 of the Complaint that "when one is trying to step up onto the curb the left foot must step up higher than the right foot by several inches" greatly mischaracterizes the condition of the substantially level curb and sidewalk; a level surface has the same elevation all over. A person stepping up the curb would simply have to raise the second foot to the level of the first".

16. Plaintiff's allegation in paragraph 12 of the Complaint that "the curb quickly begins to slant downward towards the building" is also inaccurate; the sidewalk is nearly perfectly level. This is not defective or dangerous; this is the normal and expected condition of a curb and sidewalk".

Plaintiff's Response to paragraphs 14, 15 and 16:

"On September 3, 2009, I took occasion to take a measuring tape and measure the heights of the step where Iris fell and the step to the far West and far North. I found the step to the North corner of the building would be 5 ¾ inches from the parking lot to the sidewalk. I found the step to the east corner of the building to be 5 ½ inches high. The step where Iris fell was 7 ¾ inches high, badly deteriorated from lack of maintenance on the leading edge. The asphalt was sloped from the step to the storm sewer in a dramatic

fashion. The water from the inlet was sheeting Iris' path of ingress and egress. This slope, also showing breaks in the surface from the obvious lack of maintenance, together with the broken and loose edge of the step caused Iris to fall". Spafford *Affidavit,* Para. 10.

As further stated by Clarence Kemp: "The sidewalk at this location is characterized by a variable curb height and is situated very close to a storm drain inlet with steep asphalt grades. This trip hazard was not (and is not) painted or otherwise marked to warn pedestrians." Kemp *Affidavit,* para. 8.

The curb is unmarked and uneven, including both the sidewalk and the asphalt parking lot adjoining the concrete. Both parties are in agreement that there are variable heights on the North and East asphalt and Curb, but dispute measurements taken by each party. *See Affidavit of Larry Smiltneek,* para. 12, 14, and 15; *Affidavit of Earl Spafford,* para. 4, 5, (Exhibit '4') and (*Kemp Expert's Report;* Exhibit '2') *and Affidavit of Clarence Kemp,* para. 9, 10, and 16, (Exhibit '3'). "It is my opinion that the subject premises, and specifically the site of Mrs. Spafford's fall, constitutes a permanent dangerous and defective condition, for which Granite Credit Union is responsible." Kemp *Affidavit,* para. 17.

17. "The allegation made in paragraph 13 of the Complaint that "[i]n addition a drain is located a few feet southeast of the sidewalk area in the parking lot and the asphalt around the drain slants downward toward the drain to allow the water to flow into the drain" and that this sloped pavement requires additional effort to walk up does not indicate the existence of any dangerous or defective condition to the property."

18. Mr. Smiltneek's measurements determined that the drain's nearest point was seven feet four inches east of the east curb edge and one foot seven inches south of the south curb edge. The pavement does slope toward the drain, as it must for water to flow to the drain, and this does not represent a dangerous or defective condition".

19. "Mr. Smiltneek observed many person's walking toward and stepping up the curb at the location of Ms. Spafford's alleged fall during his inspection of the property.

None showed any sign of hesitation or difficulty. Each simply approached the curb, stepped up, and moved on."

Plaintiffs' Response to paragraphs 17, 18 and 19:

The parties are in agreement that a drain is located a few feet southeast of the building and the fact that asphalt around the drain slants downward to allow the water to flow into the drain is also undisputed. *Smiltneek Affidavit,* para. 11, *Affidavit of Earl Spafford,* para. 9, (Exhibit '4')..

What is in dispute is whether the drain and the water inlets that feed it, while discharging directly into the Spafford's parking space, suffer from lack of maintenance and constitute a defective and dangerous condition. In the words of Clarence Kemp: "That additional design and maintenance violations occurred, including the drain inlet box to the East, which has a badly damaged concave grate, creating two drain inlets, that drain south and southeast of the building as shown on the attached sketch appended to Exhibit '2'. The building roof discharges directly into the parking lot where they also sheet flow into the inlets, raising concerns about icing and related pedestrian safety. It was also noted that the pavement that had settled around the south drain inlet, arising out of lack of Granite's maintenance, thus creating puddling, icing and a potential trip hazard. This also constitutes a dangerous and defective condition."

A careful reading of the affidavit of Larry Smiltneek does not once address the issue of lack of maintenance, but instead conditions his entire affidavit on "design and construction", and whether the conditions complained of constitute a dangerous and defective condition. Accordingly, plaintiffs' allegations rising to the level of improper maintenance are undisputed, and the issues surrounding defective design and construction are clearly in dispute.

It is undisputed that the drain and inlets were in the proximity of the ingress of Mrs. Spafford. *Smiltneek Affidavit,* para. 11. In the words of Earl Spafford: "The asphalt was sloped from the step to the storm drain in a dramatic fashion. The water

from the inlet was sheeting Iris' path of ingress and egress. This slope also shows breaks in the surface from obvious lack of maintenance, together with the broken and loose edge of the step, caused Iris to fall." *Spafford Affidavit,* para. 9.

These construction related problems have been further aggravated by the lack of site maintenance. It is my expert opinion that the subject premises, and specifically the site of Mrs. Spafford's fall, constitutes a permanent dangerous and defective condition, for which Granite Credit Union is responsible."*Kemp Affidavit,* para. 16,

In the words of Earl Spafford: "I have lived and re-lived that April day and the days to follow. I have visited and revisited the Credit Union many times to be sure of what I have seen. There is no doubt that Granite Credit Union was negligent in its lack of maintenance of the obvious paths of ingress and egress to the building by invited customers. It is evident to me that the steps had not been maintained for many years, or as long as the Credit Union occupied the building. Nor has the parking area around the storm drain be maintained or reconfigured. And I found no evidence that warning words, a guard rail, or any paint on the step had been installed. It is obvious to me, speaking as a layman, drawing from my common experience and knowledge, that personnel, agents, or management of the credit union either knew or should have known of the permanent, dangerous and negligent condition which I believe led to Iris' injuries." *Spafford Affidavit,* para. 12.

In the words of Clarence Kemp, Senior Project Engineer: "The site was designed to sheet drain across the parking lot pavement areas from the outside perimeter toward two drain inlets located south and southeast of the building as shown on the attached sketch. The building roof drains discharge directly into the parking lot where they also sheet flow into the inlets, raising concerns about icing, slick wet surfaces, and related pedestrian safety. It was also noted that the pavement has settled around the south drain inlet, thus raising the concrete inlet and grate ½ inch or more above the surrounding pavement, thus creating puddling, icing, and another potential pedestrian trip hazard for customers parked on the east side of the parking lot. The

drain box to the east has a badly damaged concave grate, similarly creating concerns about pedestrian safety. Again, it was noted in the follow-up inspection approximately one year later that Granite Credit Union failed to eliminate or mitigate these dangerous and defective conditions". Kemp *Affidavit*, para. 11.

20. "While the variable elevation differences between the parking lot pavement and the sidewalk at the property, ranging between two and nine inches, such changes are gradual as one moves along the curb/sidewalk at the property, particularly in the area of Mrs. Spafford's alleged fall".

21. "The southeast curb/sidewalk corner measures about eight and three-quarters inches tall. Measured six inches to the north, the east curb is about eight inches tall. Six inches further along, the curb was still eight inches tall. Four feet north of the corner the curb height was seven and one-half inches, varying only one-half inch in three feet".

22. "An eight inch curb is not remarkably tall. Stair step riser heights of seven and three-quarters inches are commonly found. Thus, the height of the curb that Plaintiffs' contend caused Mrs. Spafford's fall was about the same height as an ordinary step".

23. "Even more importantly, the fact that the top of the curb in the area of Mrs. Spafford's alleged falls is substantially level indicates that the curb in the area is neither dangerous nor defective".

24. "Plaintiffs' allege in paragraph 14 of the Complaint that "Mrs. Spafford attempted to step up onto the eastside curb of the sidewalk with her right foot. As she went to lift her left foot, she did not get her foot up completely onto the higher part of the curb. Ms. Spafford lost her balance and fell backward towards the drain hitting her head on the asphalt of the parking lot". This statement indicates that Ms. Spafford was unable to raise her left foot to the height of her right foot which she had successfully placed on top of the level curb. Mrs. Spafford's backward fall indicates that she had no forward momentum; otherwise she would have fallen forward. Together, these things show that Ms. Spafford labored to step up onto the curb, and was physically unable to complete the step, indicating that her fall was caused by

something in her own physical condition, and not by the condition of the pavement, curb and sidewalk at the Property".

Plaintiffs' Response to paragraphs 20, 21, 22, 23 and 24:

As stated by Earl Spafford: "Iris was prior to the accident a vibrant, physically strong woman (despite her small frame). She exercised regularly. She was in the swimming pool weekly while the pool was open. She romped with her grandchildren. She taught classes in church. She was even known to drive a golf ball or bowl a few games. She never walked with a cane, nor needed one. She had no history of fractures". Spafford *Affidavit,* para. 11.

"I have lived and re-lived that April day and the days to follow. I have visited and revisited the Credit Union many times to be sure of what I have seen. There is no doubt that Granite Credit Union was negligent in its lack of maintenance of the obvious paths of ingress and egress to the building by invited customers. It is evident to me that the steps had not been maintained for many years, or as long as the Credit Union occupied the building. Nor has the parking area around the storm drain be maintained or reconfigured. And I found no evidence that warning words, a guard rail, or any paint on the step had been installed. It is obvious to me, speaking as a layman, drawing from my common experience and knowledge, that personnel, agents, or management of the credit union either knew or should have known of the permanent, dangerous and negligent condition which I believe led to Iris' injuries." *Spafford Affidavit,* para. 12.

"On September 3, 2009, I took occasion to take a measuring tape and measure the heights of the step where Iris fell and the step to the far West and far North. I found the step to the North corner of the building would be 5 ¾ inches from the parking lot to the sidewalk. I found the step to the east corner of the building to be 5 ½ inches high. The step where Iris fell was 7 ¾ inches high, badly deteriorated from lack of maintenance on the leading edge. The asphalt was sloped from the step to the storm sewer in a dramatic fashion. The water from the inlet was sheeting Iris' path of ingress and egress. This slope,

also showing breaks in the surface from the obvious lack of maintenance, together with the broken and loose edge of the step caused Iris to fall". Spafford *Affidavit,* Para. 10.

As further stated by Clarence Kemp: "The sidewalk at this location is characterized by a variable curb height and is situated very close to a storm drain inlet with steep asphalt grades. This trip hazard was not (and is not) painted or otherwise marked to warn pedestrians." Kemp *Affidavit,* para. 8.

The curb is unmarked and uneven, including both the sidewalk and the asphalt parking lot adjoining the concrete. Both parties are in agreement that there are variable heights on the North and East asphalt and Curb, but dispute measurements taken by each party. *See Affidavit of Larry Smiltneek,* para. 12, 14, and 15; *Affidavit of Earl Spafford,* para. 4, 5, (Exhibit '4') and (*Kemp Expert's Report;* Exhibit '2') *and Affidavit of Clarence Kemp,* para. 9, 10, and 16, (Exhibit '3'). "It is my opinion that the subject premises, and specifically the site of Mrs. Spafford's fall, constitutes a permanent dangerous and defective condition, for which Granite Credit Union is responsible." Kemp *Affidavit,* para. 17.

"In conclusion, the civil-site development appears to be "cookie cutter" in nature with the building's perimeter sidewalk matching the finish floor elevation of the building, without regard to other site restraints. The surrounding parking lot and sidewalk infrastructure appears to have been designed and constructed to primarily address surface drainage. Pedestrian safety appears to have been almost an afterthought of the design/construction process". Kemp *Affidavit,* para. 15.

25. "The asphalt pavement, curb and sidewalk features encountered by Ms. Spafford as she made her way to the credit union building were not in violation of building code requirements, nor were the (sic) dangerous or defective".

Plaintiffs' Response:

"Three additional sidewalk trip hazards were also noted at the time of my initial inspection, as approximately ¾ inches high. The APWA (*Reference Drawing 291 of AWPA Manual of Standard Plans)* defines sidewalks with a vertical or horizontal

displacement of ½ inch or more as defective, requiring replacement. These trip hazards are likely related to settlement, and had not been addressed or corrected at the time of my follow-up inspection approximately one year later. and Granite Credit Union is responsible for this hazardous condition by failing to maintain safe premises, and to properly safeguard against settling, and to properly maintain the ingress and egress to the building in a safe and prudent manner. **Moreover, Granite Credit Union failed to eliminate or mitigate dangerous and defective conditions on the property, contributing to or causing Mrs. Spafford's injuries."** *Kemp Affidavit,* para. 10.

PLAINTIFFS' HAVE SHOWN A PRIMA FACIE CASE SUFFICIENT TO DEFEAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

"The elements for negligence are: (1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately, of injury; and (4) the suffering of damages by the plaintiff". *Williams v Melby,* 699 P.2d 723, 726. In *Williams,* a tenant rented an apartment with a mansard roof. As a result of this design, the outside wall of plaintiff's bedroom window had an inward slope and the bedroom window, standing 22 inches off the floor, was vertical, had an inward slope, despite the fact that it complied with Code. One night, plaintiff, who was sleeping on her husband' side of the bed, arose from the bed while disoriented, stumbled and fell through the window. She sustained permanent paralysis.

In reversing the trial court's grant of summary judgment on the issue of negligent design, the Supreme Court found that (1) an issue of fact existed as to whether the window was defectively designed, constructed and maintained; and expressly found that (2) defendant *Melby* breached a duty of reasonable care in not making the window safe against the possibility of someone falling through it. *Id.* at 725.

The Court went on to note that summary judgment should be granted with great caution in negligence cases *Id.* The Court also noted that "the care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and must be determined as a question of fact " *Id.* at 727

In the present case, (1) there is a clear issue of material fact as to whether the variable height pedestrian walkway on the east side of the credit union, and whether the storm drainage area was inadequately designed, constructed or maintained This is clear from the testimony of Earl Spafford, (*Affidavit,* para 3, 7, 9, 12, 15), Clarence Kemp (*Affidavit* para 9, 10, 16, 17), and even to a lesser extent, the periodic bi-annual inspections conducted by Curtis Doman, CEO for Granite Credit Union *Depo.* p 13, lines 11-25, p 14, lines1-12

This testimony is in direct contradiction to that given by Larry Smiltneek, *Affidavit* para 8, 9, 11, 12, 14, 15, 17, 18) Indeed, in the Smiltneek affidavit, he clearly glosses over the variance in the parking asphalt variable heights, to the concrete curb, and he wholly disregards the pedestrian danger caused by the water inlets, and the deteriorated storm sewer There are multiple disputed issues of material fact surrounding defective design or construction, and lack of maintenance

(2) Clearly, a duty to provide safe ingress and egress was owed to Mrs Spafford, although the *Williams* Court found this to be an issue to be determined only by the finder of fact Other Courts are in accord in concluding that "the standard of care must be gauged by the duty imposed – a question of fact " *Little v. Utah State Division of Family Services,* 667 P 2d 49, 53 (Utah 1983)

In the present case, not only did the Granite Credit Union CEO engage in bi-annual safety inspections, it also candidly admitted that it had had the asphalt repaired and presumably modified well after the building's construction, *(Doman Deposition, Id)* This is an issue of fact that cannot be ruled upon properly as a question of law

(3) The issue of causation is directly in dispute by the testimony of Clarence Kemp, *(Affidavit* para. 16, 17) and Earl Spafford, (*Affidavit* para. 12). Again, this is a material disputed fact, one of which all competing favorable inferences should be construed in favor of the nonmoving party, i.e., Earl & Iris Spafford.

(4) The suffering of the element of damages is not before the Court, as Defendant's Motion goes only to the issue of liability.

But there is one other element that needs to be proven in some negligent fall cases. The element of notice. In *Allen v. Federated Dairy Farms, 538* P.2d 175, 176 (Utah 1975) the court observed that there are two competing classes of negligence in fall down cases:

> The first involves some unsafe condition of a *temporary* nature, such as a slippery substance on the floor and usually where it is not known how It got there. *Id.*

In this class of cases it is universally held that fault cannot be imputed to the defendant unless he had knowledge of the condition, or constructive knowledge because the condition had existed long enough that he should have discovered it. This can be argued in the present case, due to the age of the defective condition, the periodic inspections by the CEO, and by its own attempts to repair the asphalt.

> The second class of cases involves some unsafe condition of a *permanent* nature, such as: in the structure of a building, or of a stairway, etc. . . In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary.
>
> > *Id.*, citing *Maugeri v. Great Atlantic and Pacific Tea Company,* 357 F.2d 202 (3rd Cir. 1966). *Accord, Long v. Smith Food King,* 531 P.2d 360, 361 (Utah 1973).

This second class of case is more applicable to the case before the Court, as the negligence complained of is of a *permanent* nature, and the defendant is deemed to know of the condition. Accordingly, no further proof is necessary and this element of proof has been satisfied.

We submit that all elements of Plaintiffs' claim of negligence have been shown by a prima facie case, except that of duty, which cannot properly be ruled upon as a matter of law. It is and remains a question of fact.

EXPERT TESTIMONY IS UNNECESSARY TO PROVE PLAINTIFFS' NEGLIGENCE CLAIM

The defendants have argued that to prove a claim of negligence, expert testimony is required. It then goes on to cite case law concerning claims brought under a professional liability theory against engineers, builders, and architects. Defendant is in error. This is not a professional liability claim. It is primarily a claim of failure to remedy construction defects through neglect and lack of maintenance. Although in *Wycalis v. Guardian Title of Utah,* 780 P.2d 821, 826, f. 8 (Utah App. 1989) the Court did make reference to a case in which expert testimony was not required to prove the negligence of a surveyor. *See Daniel, Mann, Johnson, & Mendenhall v. Hilton Hotels Corp.* 642 P.2d 1086, 1087 (Nev. 1982).

Defendants argue that expert testimony is required to establish the standard of care. This has been clearly satisfied by the testimony of Clarence Kemp, however, defendant's argument remains misplaced. In *Daniel, Mann, Johnson & Mendenhall, supra.*, the court found:

> We also disagree with appellant's contention that expert testimony is required to prove the breach of duty. It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. (citations omitted). Where as in the instant case, the service does not rise to the esoteric knowledge or uncertainty that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of performance. *Id., citing Aetna Insurance Co. v. hellmuth, Obata, Kassabaum, Inc.*, 392 F.2d 472, 478 (8th Cir. 1968).

In the present case, the testimony of Earl Spafford clearly is within the common knowledge of laypersons. He states what are obvious observations about the lack of maintenance, he gives the only eye witness testimony of the injury, and he measures a curb using a simple tape measure. Surely, his testimony is admissible for the simple assertions made in his affidavit, as being within the domain of knowledge or experience of a layperson. *Accord, Cable*

v. State, 380 S.E.2d 714, 715 (Ga. App. 1989) (where jurors must be credited with knowing by reason of common knowledge, expert medical testimony is not required for plaintiff to establish a personal injury verdict); *Walton v. Gallbraith,* 166 N.W.2d 605, 606 (MI App. 1969) (It should be clear to men of common experience that the *cause* of the injuries was the accident and submit that no expert was needed to demonstrate that fact). I urge the Court to recognize the common knowledge of the average layperson as set forth in the Affidavit of Earl Spafford, and submit that his his testimony is sufficient to create a disputed issue of material fact.

Moreover, the affidavit of Patricia L. LaTulippe, former counsel for plaintiffs, clearly satisfies the good cause requirement of Rule 6(b), pending before the Court, seeking an enlargement of time to certify plaintiffs' expert on the grounds and for the reason that both Counsel for Plaintiff and Counsel for defendant had an oral stipulation for a flexible and open ended timetable to comply with the scheduling order. This was not disclosed to Plaintiffs by either Counsel until September 29, 2009. (See attached affidavit of Counsel, marked exhibit '6').

As discussed above, establishing the standard of care in a negligence case is a question of fact that should not be ruled upon as a question of law. *Williams v. Melby, Id.* As such, for purposes of this Motion, expert testimony cannot make or break the case as it this is not a question of law, but a question for the finder of fact.

In addition, the Utah Courts have repeatedly stated: "that the trial judge has the primary responsibility for determining whether a particular witness qualifies as an expert and its ruling will not be disturbed on appeal unless it was clearly in error." *Little v. Utah State Division of Family Services, Id.* at 52. Indeed, under Utah Law, the trial judge has considerable discretion to determine whether a particular expert is qualified and whether particular testimony would be helpful and suitable in a particular case. *Gaw v. State of Utah Dep't of Transportation,* 798 P.2d 1130, 1134 (Utah App. 1990).

In the present case, plaintiffs' expert is truly the only individual qualified to act as a true expert witness. He has 29 years of hands on experience in infrastructure and building related issues, and has authored multiple City Safety Ordinances in conjunction with pedestrian safety. (see exhibit '1'). Surely his testimony would be helpful to the Court and would place the true factual basis before the Court.

Conversely, Defendant's expert is a mechanical engineer. Not a civil or structural engineer. He has no experience in construction, let alone drafting municipal safety ordinances. His expertise is in equipment malfunctions or in auto accident investigation. To bar Clarence Kemp from testifying, while relying upon the conclusory and misguided statements of Larry Smiltneek would be a travesty of justice. One that would prejudice the plaintiffs and would then lend itself to misleading the court.

I urge the Court to recognize the testimony of Earl Spafford, as speaking within the knowledge and experience of a layperson, and to further allow the testimony of Expert Witness Clarence Kemp.

CONCLUSION

It is undisputed that on a Motion for Summary Judgment, all competing inferences of material fact should be favorably construed in favor of the non-moving party. Moreover, as stated by the Utah Supreme Court, summary judgment should only be granted in a negligence case with great caution. Particularly when the standard of care element is deemed a question of fact, and should not be ruled upon as a matter of law.

Finally, it is just and proper for Earl Spafford to testify as to subject matter that is within the common experience and knowledge of a layperson, and his affidavit should be admissible. Expert testimony is not required. And in light of the Affidavit of former counsel, excusable neglect has been demonstrated, and Clarence Kemp should be certified as an Expert Witness. His testimony would be particularly helpful to the court under the present circumstances.

For the foregoing reasons, Defendant's Motion for Summary Judgment is without merit and should be denied in its entirety.

DATED this 12th day of October, 2009

Earl S. Spafford, In Propria Persona

Iris M. Spafford, In Propria Persona

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
SALT LAKE CITY DEPARTMENT, STATE OF UTAH

IRIS M. SPAFFORD AND EARL S. SPAFFORD,	)
	) Case No. 070911059
	) Judge Tyrone E. Medley
Plaintiffs,	)
	) Deposition of:
vs.	) **CURTIS LYNN DOMAN**
	)
GRANITE CREDIT UNION,	)
	)
Defendant.	)

April 14, 2009; 1:23 p.m.

Location: NIELSEN & SENIOR, P.C.
5217 South State Street
Suite 400
Salt Lake City, Utah

Reporter: Angela L. Kirk, RPR, CCR

Exhibit-1, and do you recognize this document?

A. I do.

Q. And we've just looked at it and I think you've identified the signature earlier on page 21.

A. Yes.

Q. So I just want to ask you some questions about the document. And I'd like you to look at Interrogatory No. 3 and -- did you find that, the response?

A. Okay.

Q. The question has asked you to identify who had responsibility for the inspection, maintenance, and repair of the parking lot. And there's some objections. And first of all, I want to get your definition or understanding of what inspection, maintenance, and/or repair of the parking lot would mean.

MR. MONCUR: I'm going to object as compound. Maybe you could take them one step at a point in time.

MS. LaTULIPPE: That's fine. Thank you.

Q. So what would be your understanding of an inspection?

A. Looking at the property.

Q. Okay. And maintenance?

A. Upkeep of the property.

Q. And repair?

A. Would be repairs to -- or to correct damages or deficiencies.

Q. Okay. So using that definition that you've just provided me with, I want you to tell me who is responsible for inspecting the parking lot.

A. We haven't clearly defined that, but certainly as CEO when I would visit branches I would typically do a site visit and walk through.

Our branch managers, as part of their regular duties, would look for anything that would seem to need attention.

And although it's probably not formalized, certainly any employee of the credit union that was aware of something, we would want and encourage them to bring it to the attention of the branch manager or management so that they could be corrected.

Q. Okay. So how often would the inspecting be done?

A. Oh, I would typically visit a branch at least two times a year and probably more frequent visits, but at least twice a year I would make a fairly detailed site visit.

Q. And would you keep any records regarding your detailed site visit?

A. I typically would not.

Q. So what do you -- walk me through a detailed site visit.

A. I don't know if a detailed site visit is a good word, but in a visit to a branch when I go out I'll typically walk around the property, walk around the inside of the branch. If there's things I note that need to be done, I'll refer them to the appropriate people and let them correct them.

Q. And when you're walking around the outside of the branch on the property, what are you looking for?

A. Just anything that looks like it could use repair.

Q. Okay. Are there -- can you give me some examples of repairs that you've had done based upon a site visit?

A. A fence replaced, trees replaced.

MR. MONCUR: I'm going to object to the extent this is vague as to which branch.

Q. And we can make this specific to the Midvale branch.

A. Okay.

Q. So anything in particular that you've brought to the attention of -- well, it would be the attention of you. Anything that you've -- any work that you've

the property, we did not get a third-party opinion on -- on things. I do remember making some modification to some doors to allow for more easy -- for easier handicapped access. The timing of that, I don't recall.

Q. Do you recall any other modifications that were made to the property?

A. Not that I recall.

Q. We talked about records regarding inspections, maintenance, and I think you testified that there were not any records other than it may be reflected in the quarterly manager's report on the premise.

A. The internal audit report would have a check mark that says the manager has looked at that and which may or may not have comments. Typically not, if they found it in good repair. But I think that question started after 2005, that's my recollection.

Q. And in response to that question, the written question, the response is that Granite Credit Union's in the process of locating documents relating to the repairs performed on the parking lot and will produce those. Do you have those -- do you know what the status is of that?

A. I don't know and -- don't know what we've

done to find additional repairs. I'm not aware of any repairs except asphalt replacement kind of things.

Q. And is there someone who's in charge of finding those documents to supplement the production?

A. I'll follow -- I can follow-up on that and find out what we've got, if anything.

Q. Okay. That would be great.

THE WITNESS: Will you make a note of that as well?

MR. MONCUR: Yeah.

Q. The next question talks about modifications or changes to the parking lot and the sidewalk. And Granite Credit Union's objected based upon the terms "modifications," "changes," and the same inspection, maintenance, and repair. I'm just wondering, could you define for me what your understanding of modification is?

A. Changes to the -- substantive changes to the arrangement of the parking lot or construction.

Q. And based upon that understanding, have there been any modifications to the parking lot at the Midvale property?

A. None that I'm aware of.

Q. And no modifications or changes to the sidewalk?

Anthony C. Kaye (#8611)
Matthew L. Moncur (#9894)
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111-2221
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Attorneys for Defendant Granite Credit Union

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

IRIS M. SPAFFORD AND EARL S. SPAFFORD, **Plaintiffs,** **vs.** **GRANITE CREDIT UNION,** **Defendant.**	**GRANITE CREDIT UNION'S RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS** **Case No. 070911059** **Honorable Tyrone Medley**

Pursuant to Rules 33 and 34 of the Utah Rules of Civil Procedure, Defendant, Granite Credit Union (the "Credit Union" or "Defendant")), responds to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents to Defendant (the "Requests"), as follows:

Δ π EXHIBIT 1
Deponent Doman

RESPONSE: The Credit Union incorporates by reference the general objections and objects to Interrogatory No. 2 on the grounds that it seeks information that it seeks information that is irrelevant and unlikely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, the Credit Union states that it has owned the premises continuously since prior to January 1, 1990.

INTERROGATORY NO. 3: Identify each person having responsibility for inspection, maintenance, and/or repair of the parking lot, describe in detail each such person's responsibilities and identify by date, present location and custodian of each document relating to such responsibility.

RESPONSE: The Credit Union incorporates by reference the general objections. Subject to and without waiving these objections, the Credit Union states that Credit Union management is responsible for periodically inspecting the parking lot and that maintenance and/or repair of the parking lot are performed on an as-needed basis. The Credit Union further states that it is in the process of locating documents relating to repairs performed on the parking lot and will produce any documents that it locates pursuant to Utah R. Civ. P. 33(d).

INTERROGATORY NO. 4: If Defendant contends that another entity, person, etc. has responsibility of the parking lot and sidewalk at issue in this Complaint, describe in detail all verbal or other understandings, agreements or arrangements Defendant has with any other such entity, person, etc.

RESPONSE: The Credit Union incorporates by reference the general objections. The Credit Union further objects to Interrogatory No. 4 on the grounds that it seeks information that

Tab 8

Patricia L. LaTulippe (#5746)
NIELSEN & SENIOR, P.C.
5217 South State Street, Suite 400
Salt Lake City, UT 84107
Telephone: (801) 327-8200
Facsimile: (801) 327-8222
Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,

SALT LAKE CITY DEPARTMENT, STATE OF UTAH

IRIS M. SPAFFORD AND EARL S. SPAFFORD Plaintiffs, vs. **GRANITE DISTRICT CREDIT UNION,** Defendants.	**AFFIDAVIT OF PATRICIA L. LaTULIPPE** Case No. 070911059 Judge Tyrone E. Medley

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

PATRICIA L. LaTULIPPE, being first duly sworn and under oath deposes and states as follows:

1. I am over the age of 18 and have personal knowledge of the facts set forth herein.

2. I am licensed to practice in the State of Utah and have specialized in the area of personal injury since 1994.

3. Nielsen & Senior represented Iris and Earl Spafford in regards to a slip and fall accident that occurred on April 4, 2005, at the Granite Credit Union.

4. During the course of the discovery period, I worked with opposing counsel to continue the scheduling order on several occasions.

5. Counsel and I struggled with obtaining copies of all the documents pertinent to this case and scheduling depositions of the various witnesses.

6. Our firm withdrew from representing Iris and Earl Spafford on May 4, 2009.

7. At the time of Nielsen & Senior's withdrawal from the case, it was my understanding that opposing counsel and I had agreed to an open ended, flexible deadline schedule.

8. Several depositions were taken in the spring regarding this case and at that time we both realized we needed additional information and time. Opposing counsel had difficulty getting medical records and when they were provided they were voluminous totaling over a thousand pages.

9. At a Granite Credit Union deposition of the President or Vice President of the company, it became apparent that we had not deposed the correct witnesses to obtain the information we needed.

10. We had relied upon Granit Credit Union to identify the employees that would be knowledge about Ms. Spafford's fall and subsequent company follow up, policies and procedures.

11. Counsel and I discussed needing additional time to get the correct people deposed and being flexible on the deadlines.

12. It was my understanding that we would work on continued deadlines once we had a sense of how much longer the fact witnesses were going to take.

DATED this 18th day of September 2009.

Patricia L. LaTulippe

SUBSCRIBED AND SWORN TO before me this 18th day of September 2009.

NOTARY PUBLIC
Residing in Salt Lake County

Notary Public
HEIDI F. McEWEN
36 South State Street, Suite 2400
Salt Lake City, Utah 84111
My Commission Expires
May 25, 2010
State of Utah

Tab 9

Earl S. Spafford
Iris M. Spafford
6026 Village III Road
Murray City, UT 84121
Telephone: (801) 699-8474

November 3, 2009

Honorable Tyrone Medley
Judge, Third District Court
Matheson Court House
Salt Lake City, UT 84101

Re: Spafford vs Granite Credit Union070911059
Civil No.

Dear Judge Medley:

I received in this mornings mail the enclosed Affidavit from our former Attorney. While this Affidavit was not requested by Plaintiffs, it occurred to me that it was most helpful in clarifying further the Plaintiffs' Motion to Enlarge Time To Certify Our Expert and our Opposition to Defendant's Motion to Strike our Affidavit of our Expert Witness.

These matters will be submitted without delay, and it is our desire to have all of these related motions to be set, along with other pending motions, on the 24th day as November, 2009, as previously set by the court.

Thank you for your many courtesies.

Very truly yours,

Earl S. Spafford
Iris M. Spafford

cc: Matt Moncur

Patricia L. LaTulippe (#5746)
NIELSEN & SENIOR, P.C.
5217 South State Street, Suite 400
Salt Lake City, UT 84107
Telephone: (801) 327-8200
Facsimile: (801) 327-8222
Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,

SALT LAKE CITY DEPARTMENT, STATE OF UTAH

IRIS M. SPAFFORD AND EARL S. SPAFFORD Plaintiffs, vs. **GRANITE DISTRICT CREDIT UNION,** Defendants.	**SUPPLEMENTAL AFFIDAVIT OF PATRICIA L. LaTULIPPE** Case No. 070911059 Judge Tyrone E. Medley

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

PATRICIA L. LaTULIPPE, being first duly sworn and under oath deposes and states as follows:

1. I am over the age of 18 and have personal knowledge of the facts set forth herein.

2. I am licensed to practice in the State of Utah and have specialized in the area of personal injury since 1994 and worked on the Plaintiffs' case until our law firm withdrew as counsel.

3. On April 14, 2009, pursuant to Rule 30(b) and the designation made by Defendant Granite Credit Union, the deposition of the President of Granite Credit Union was taken at the law offices of Nielsen & Senior.

4. It was apparent from the President's answers in his deposition that many of the documents requested in discovery had not been produced by the Defendant and that the President, designated as a person with the requisite knowledge regarding the Defendant to testify, knew very little of the facts, the subsequent investigation by the Credit Union of Ms. Spafford's fall and other relevant information.

5. In fact, it appeared from the deposition that the President had not prepared for his deposition, was unaware of the particular documents requested through discovery, where the documents had been stored during the pendency of this matter, what his secretary had done to prepare responses to the request for documents and if the documents had been produced.

6. I learned at the President's deposition that he was going through a serious personal matter and do not fault the President for his lack of involvement in the litigation or preparation for his deposition.

7. However, Plaintiffs had to rely on the Defendants to name the best Rule 30(b)(6) witness to testify and the President was a poor designation.

8. As a result, Mr. Moncur and I discussed that it was obvious the Plaintiffs would have to depose other witnesses and that before the depositions could take place Plaintiffs would need to receive additional documents from Defendants.

9. Both Mr. Moncur and I agreed that at least two additional witnesses would need to be deposed.

10. I spoke with counsel, Matthew Moncur, after the deposition about getting the additional documents and deposing the additional witnesses.

11. It was at this time Mr. Moncur and I reached an agreement to be flexible in anticipation of the additional discovery needed in this case.

12. During the course of our working together on this case, Mr. Moncur and I had had no problems extending the deadlines as needed.

13. We had filed stipulated written extensions prior to our agreement in April 2009.

14. During our discussions at the deposition, Mr. Moncur did not state or give any indication that a written agreement was necessary between us.

15. At the time I withdrew from the case, we were still in the fact discovery stage of the case and had several matters that needed further follow-up.

16. At the time I withdrew from the case, I communicated with the Spaffords that there were no pressing deadlines, that Mr. Moncur and I had discussed and knew we needed to complete additional fact discovery, that we had agreed to work through the discovery issues that came to light at the April 14, 2009 deposition and that there was a flexible agreement in place.

17. Because Nielsen & Senior withdrew from the case, I believe that the Spaffords have tried to minimize any additional time for our law firm.

18. I did not learn about the problems the parties were having with the deadlines until shortly before I filed my first affidavit.

19. My testimony is not a manufactured last minute effort to assist the Plaintiffs in their claims.

20. Rather it is my understanding, and personal knowledge of the status of the Plaintiffs' case and the pending deadlines at the time the law firm of Nielsen & Senior withdrew.

DATED this 30th day of October 2009.

Patricia L. LaTulippe

SUBSCRIBED AND SWORN TO before me this 30th day of October 2009.

NOTARY PUBLIC
Residing in Salt Lake County

Notary Public
HEIDI F. McEWEN
36 South State Street, Suite 2400
Salt Lake City, Utah 84111
My Commission Expires
May 25, 2010
State of Utah

Tab 10

Earl S. Spafford
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909
Cellular: (801) 699-8474

Iris M. Spafford
Attorney Pro Se
6026 Village III Road
Murray, Utah 84121
Telephone: (801) 278-5909

**IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH**

IRIS M. SPAFFORD, and EARL S. SPAFFORD	}	**PLAINTIFFS' OBJECTION TO MOTION TO SUBMIT**
vs.	}	
GRANITE CREDIT UNION, A Utah Corporation,	}	Case No. 070911059 Judge Tyrone Medley
Defendant.	}	

COMES NOW the plaintiffs to file its opposition to Defendant's Motion to Submit various and sundry motions, dated January 22, 2010, on the grounds and for the reason that the matter has been reduced to final judgment, the motions that defendant seeks to submit for

decision are moot, and any further filing of pleadings constitutes an abuse of process by the defendants.

It is unfortunate, but not surprising, that Counsel for Granite continues to waste the court's precious time, in derogation of the public policy in favor of judicial economy, in order to gain some sort of procedural or psychological advantage through gamesmanship. This is evidenced, for example, by its most recent opposition filing to plaintiffs' motion to strike defendant's opposition to motion to recuse or disqualify, and magnified by its January 22, 2010 Motion to Submit.

In defendant's own opposition filing, dated January 5, 2010, referenced above, woefully untimely at best, counsel for Granite candidly acknowledges, in a footnote, their belief that the present pending motion to strike is likely moot. This is particularly evident when the Trial Judge denied the motion on December 17, 2009, and the Presiding Judge entered a written opinion on December, 21, 2009 thereby clearly rendering the related motions moot. And the final judgment was entered on December 30, 2009; yet, counsel for Granite made the election to further abuse process by filing an opposition on January 5, 2009, well after the fact, and now seeks to submit this and other moot or untimely motions for decision.

In truth, this is nothing but a transparent effort to interject additional personal attacks upon the plaintiffs, Earl Spafford and Iris Spafford, into the record, and to further buttress counsels' position as self appointed policemen and advocate for the trial court, during a short hiatus, when the court lacked jurisdiction to rule upon anything except the legal sufficiency of the affidavit of prejudice.

Surely the able and learned trial judge and presiding judge are capable of reviewing the pleadings and the record, as their sole jurisdictional obligation under Rule 63(b), without the need for counsel for defendant to act as self appointed policeman or worse, advocate for the trial court, again, acting in a capacity almost akin to Defendant entering a general appearance for the trial court.

Apparently, realizing that this issue would likely be addressed by the Court of Appeals, Counsel for Granite found it incumbent to further attempt to damage plaintiffs' claims and legal

entry of the final judgment, final as to all of the claims and all of the parties, defendant's most recent filings rise to the level of an abuse of process.

Moreover, by the very filing of its January 5, 2010 opposition, defendant has further compounded the appearance of prejudice, bias and lack of lack of impartiality, by taking an advocacy role on behalf of the trial court. At the very least, this gives rise to the appearance of impropriety.

This lends itself to counsel for defendants entering almost a general appearance for the trial court which, when taken to the next logical level, enlarges what may very well rise to the level of real prejudice against plaintiffs and defendant, now acting as the court's agent, and effectively circumvents the prohibition against the trial judge's ability, upon denial of the motion, to comment upon the motion before referring the matter to the presiding judge. *Accord, Anderson v. Anderson,* 368 P.2d 264, 265, f. 1 (Utah 1962). Anything less clearly circumvents this prohibition.

Moreover, almost contemporaneous with the filing of this objection, plaintiffs have filed a Notice of Appeal, thereby divesting the trial court of further jurisdiction in this matter. Counsel for defendant Granite have acted improperly, and plaintiffs verily believe that such action warrants comment, direction and guidance from the appellate courts.

DATED this 25 day of January, 2009.

/s/
Earl S. Spafford, Attorney Pro Se

/s/
Iris M. Spafford, Attorney Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class mail, postage prepaid, to Counsel as follows: Anthony C. Kaye and Matthew L. Moncur, 201 South Main Street, Suite 800, Salt Lake City, UT 84111, on this 25th day of January, 2010.

/s/
Earl S. Spafford

Tab 11

CARMEN **MOREL**, et al., Plaintiffs, v. **DAIMLER-CHRYSLER** CORPORATION, et al., Defendants.

CIVIL NO. 05-2162 (FAB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

2009 U.S. Dist. LEXIS 59494

June 15, 2009, Decided

PRIOR HISTORY: Morel v. Daimler-Chrysler AG, 565 F.3d 20, 2009 U.S. App. LEXIS 9743 (1st Cir. P.R., 2009)

CORE TERMS: disclosure, expert witnesses, substitution, harmless, discovery, substantially justified, requesting, untimely, expert testimony, prejudiced, deadline, prepare, notice, discovery violations, subject matter, preparation, deposition, mitigate, illness, deposition testimony, opposing party, harmlessness, prejudicial, scheduling, materially, surprised, waited, sick, interlocutory appeal, trial date

COUNSEL: [*1] For Carmen Morel, Plaintiff: David C. Indiano-Vicic, Seth Erbe, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR.

For Jose Roman, Jean Carlos Roman, Fernando Roman-Concepcion, Plaintiffs: David C. Indiano-Vicic, LEAD ATTORNEY, Seth Erbe, Indiano & Williams, PSC, San Juan, PR.

For Daimler-Chrysler Corporation, Defendant: Antonio Gnocchi-Franco, LEAD ATTORNEY, Gnocchi-Franco Law Office, San Juan, PR.

For DaimlerChrysler AG, Defendant: Diego A. Ramos, LEAD ATTORNEY, Roberto A. Camara-Fuertes, Fiddler, Gonzalez & Rodriguez, San Juan, PR; PHV Bertrand LeBlanc, LEAD ATTORNEY, Carroll, Burdick and McDonough LLP, San Francisco, CA; PHV Robert M. Hanlon, Sr., LEAD ATTORNEY, Hanlon Bogliolit Hanlon PC, Edison, NJ; PHV Robert M. Hanlon, Jr., Hanlon, Boglioni & Hanlon PC, Township of Edison, NJ.

JUDGES: FRANCISCO A. BESOSA, UNITED STATES DISTRICT JUDGE.

OPINION BY: FRANCISCO A. BESOSA

OPINION

OPINION AND ORDER

BESOSA, District Judge

On April 27, 2009, defendant Daimler AG ("defendant"), formerly known as DaimlerChrysler AG, filed a motion requesting leave to substitute one of its previously disclosed expert witnesses. (Docket No. 212) Plaintiffs filed an opposition on May 13, 2009, requesting that the motion be denied unless [*2] certain conditions were placed on defendant's substitution. (Docket No. 219) On May 22, 2009, defendant filed a response to plaintiffs' opposition. (Docket No. 222)

For the reasons discussed below, the Court hereby **GRANTS** defendant leave to substitute its expert witness free of any conditions proposed by plaintiffs.

Procedural and Factual Background

Defendant completed prior discovery for all expert witnesses in a timely manner. The discovery deadline was September 30, 2007. (Docket No. 100) The final exhibit list and the exchange of demonstrative aids to be used by expert witnesses were due on December 19, 2007. (Docket No. 159) On January 10, 2008, plaintiffs filed a motion to stay the proceedings in the district court during the pendency of an interlocutory appeal they filed from an order partially granting summary judgement. (Docket No. 193) Defendant filed a response on January 11, 2008, agreeing with plaintiffs' request for a stay, and further requesting a continuance if the stay was not granted because their "key liability defense expert[]" Charles Warner ("Dr. Warner"), Ph.D., had a pancreatic tumor requiring surgery, and the defense needed time to retain a substitute. (Docket [*3] No. 195, p. 1) The Court granted plaintiffs' request for a stay the same day. (Docket No. 196) Unfortunately, Dr. Warner died on November 9, 2008. (Docket No. 212) He was a professional engineer hired to testify for defendant on a number of issues. (Id.)

On April 27, 2009, defendant filed a motion to substitute Richard Keefer, a professional engineer, for Dr. Warner pursuant to the Courts's power to modify expert witness disclosures. Id.; see Fed.R.Civ.P. 26(a)(2)(B). Plaintiffs filed an opposition on May 13, 2009, requesting that the motion be denied, or if granted, that conditions be placed on the substitution. (Docket No. 219) On May 22, 2009, defendant filed a response to the opposition pointing to a lack of authority for plaintiffs' conditions on the motion. (Docket No. 222) The interlocutory appeal was decided on May 6, 2009, obviating the basis for the stay in this case. (Docket No. 224) A status and scheduling conference is scheduled to be held on **June 18, 2009.** (Docket No. 225; see also Docket. No. 223) Although a date has not been set for trial, the parties have advised the Court they are occupied elsewhere during the months of at least July and August. (Docket No. 223) Nothing [*4] else remains to be done prior to trial save a final pretrial ocnference.

Discussion

I. Standard for Discovery Violations

Rule 26(a)(2) requires parties to disclose the identity of their expert witnesses as well as their experts' reports in accordance with scheduling orders issued by the trial court. Fed.R.Civ.P. 26(a)(2). Each party must supplement its disclosures "in a timely matter if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Id. at 26(e). For expert witnesses, the information in the report and in depositions must be supplemented, and any changes "must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." Id. If a party fails to provide or supplement the information required in Rule 26(a) or 26(e), that information will be excluded unless the failure is substantially justified or harmless. Fed.R.Civ.P. 37(c)(1). In addition to or in place of exclusion, the Court may order other sanctions including payment of expenses caused by the failure to comply with the Rules. Id.; see Radecki v. Joura, 177 F.3d 694, 696 (8th Cir. 1999); McNerney v. Archer Daniels Midland Co., 164 F.R.D 584, 587 (W.D.N.Y. 1995) [*5] ("[P]rejudice . . . can be remedied by . . . allowing . . . counsel to recover reasonable expenses and attorney's fees.").

The goal of Rule 26(a) is to promote full disclosure of the facts and prevent "trial by ambush," because opposing counsel cannot adequately cross-examine without advance preparation. Macaulay v. Anas, 321 F.3d 45, 50, 52 (1st Cir. 2003); see Johnson v. H.K. Webster, Inc., 775 F.2d 1, 6-7 (1st Cir. 1985). Rule 37 requires exclusion unless the party facing sanctions can show that the failure to comply was justified or harmless. Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 20-21 (1st Cir. 2001). Exclusion is a strong impetus to follow the Federal Rules of Civil Procedure ("Rules") and the schedule set by the Court. See Thibeault v. Square D Co., 960 F.2d 239, 245 (1st Cir. 1992).

Introducing "new expert testimony on the eve of trial" can prejudice the opposing party and therefore will not be admitted without good cause. Id. at 247. "Rules 26(a) and 37(c)(1) seek to prevent the unfair tactical advantage that can be gained by failing to unveil an expert in a timely fashion . . . ." Poulis-Minott v. Smith, 388 F.3d 354, 358 (1st Cir. 2004) (citing Thibeault, 960

F.2d at 244). [*6] The Court has discretion to admit tardily proffered expert evidence without sanctions upon a finding of substantial justification or harmlessness. See, e.g., id. The Court must balance fairness to the parties with the need to manage dockets, taking into account the totality of the circumstances, such as: the history of the litigation, the need for the challenged evidence, any justifications, prior notice of the expert and the possibility of designation, whether the testimony will be meaningfully different from or cover the same areas as that of the original expert, and the ability of the opposing counsel to depose or cross-examine the new expert. Macaulay, 321 F. 3d at 51; see Ferrara & DiMercurio v. St. Paul Mercury Ins. Co., 240 F.3d 1, 10-11 (1st Cir. 2001). A late disclosure is harmless if it "occurs long before trial and is likely subject to correction" without materially prejudicing the opposing party. Samos Imex Corp. v. Nextel Commc'ns, Inc., 194 F.3d 301, 305 (1st Cir. 1999); see Ferrara & DiMercurio, 240 F.3d at 10; Downeast Ventures, Ltd., v. Washington County, 450 F.Supp.2d 106, 112 (D.Me. 2006).

II. Sanctions Under Rule 37(c)(1)

Rule 37 requires exclusion or lesser sanctions [*7] unless the untimely disclosure was substantially justified or harmless. Fed.R.Civ.P. 37(c)(1). In this case, the late disclosure is substantially justified because a critical expert witness died after the deadlines for discovery had passed. The late disclosure is harmless because the plaintiffs will not be materially prejudiced. Imposing exclusion or other sanctions for the untimely disclosure of an expert witness under these circumstances is uncalled for.

Defendant's motion is supported by substantial justification. Death of an expert witness falls squarely within the category of circumstances that require a late disclosure; the only question regarding justification is whether the party waited too long to notify the Court of the need for a new expert. Compare Klonoski v. Mahlab, 156 F.3d 255, 272 (1st Cir. 1998) (finding failure to receive evidence until days before trial insufficient justification for late submission when it was the party's fault the evidence arrived so late), and LaPlace-Bayard v. Batlle, 295 F.3d 157, 162 (1st Cir. 2002) (finding insufficient justification when counsel waited to see if case would settle before obtaining and disclosing new expert past deadline), with [*8] Ferrara & DiMercurio, 240 F.3d at 8, 10-11 (upholding substitution three months before trial when necessitated by the previous expert's death). Although plaintiffs note that defendant waited six months after Dr. Warner's death to file this motion, the case was stayed pending appeal. Further, no date for trial had or has been set. It may have taken some time to find an expert capable of filling Dr. Warner's shoes. Defendant had no control over the unforeseeable illness and death of Dr. Warner. He became sick after the discovery deadline. The Court does note however, that defendant knew Dr. Warner was sick a year ago and could have tried to make some advance preparation in case of an untimely death. The Court will give defendant the benefit of the doubt as to whether such delay was the result of the difficulty in finding a replacement expert. Even if the Court were to have found that the expert's death did not provide defendant with a substantial justification, it would still find the substitution to be harmless.

The untimely disclosure is harmless because it is not materially prejudicial to plaintiffs. Plaintiffs will not be prejudiced because they had notice of the possibility of substitution, [*9] they will not be surprised by new subject matter or a new theory of liability, and they have ample time to formulate a response and prepare cross-examination. See Downeast Ventures, Ltd., 450 F.Supp.2d at 111 (citing Ferrara & DiMercurio, 240 F.3d at 10). The goal of discovery is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." Thibeault, 960 F.2d at 244 (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)). Allowing substitution furthers this goal of a fair contest for both parties because without the new expert the defense would be punished for the death of one of its witnesses, and with the substitution the plaintiffs still have the ability to adequately prepare.

Defendant disclosed to plaintiffs a year ago that Dr. Warner was sick and a substitute was needed. Plaintiffs' notice of Dr. Warner's illness in January 2008, weighs against a finding that

they will be material prejudiced. Plaintiffs should have anticipated a new expert and the possibility of new testimony. This motion should come as no surprise. Plaintiffs' advance notice mitigates the prejudice of a late [*10] disclosure.

Nor will plaintiffs be surprised with new material. Prejudice may arise when a party is surprised with new theories of liability or a new subject matter after the deadlines for discovery have passed. See Poulis-Minott, 388 F.3d at 359; Macaulay, 321 F.3d at 52; Ferrara & DiMercurio, 240 F.3d at 10-11. Defendant has made clear that Mr. Keefer will testify on the same topics as Dr. Warner. Defendant and plaintiffs are in agreement that no new subject matter will be addressed. [1] If after the deposition is taken plaintiffs find new material is being covered, they can file the appropriate motions requesting exclusion as was done in Poulis-Minott v. Smith, where only information in late reports beyond the original scope of the timely reports was excluded. 388 F.3d at 359. As long as there is no "meaningful change in testimony," plaintiffs will not be prejudiced. Ferrara & DiMercurio, 240 F.3d at 10.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

1 Plaintiffs cite to unreported district court cases from Kansas and Indiana, both of which support the rule that late substitution is not prejudicial when the new expert testifies on the same material with similar opinions as the prior expert. See Ind. Ins. Co., v. Valmont Elec., Inc., No. TH97-009-C-T/F, 2003 U.S. Dist. LEXIS 17176, 2003 WL 22244787, at *1 (S.D. Ind. Jul. 31, 2003) [*11] ; Manildra Milling Corp., v. Ogilvie Mills, Inc., No. 86-2457-S, 1991 U.S. Dist. LEXIS 14159, 1991 WL 205691, at *1 (D. Kan. Sept. 23, 1991).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Perhaps most important for the harmlessness analysis, plaintiffs will not be prejudiced by the substitution because they have time to prepare for cross-examination. An ability to cure or mitigate any prejudice resultant from submitting late expert disclosures with minimum disruption to trial weighs in favor of harmlessness. See e.g., Johnson, 775 F.2d at 7 n.7, 8; Downeast Ventures, Ltd., 450 F.Supp.2d at 112. The ability to mitigate the prejudice depends on how long before trial the disclosure is made. See LaPlace-Bayard, 295 F.3d at 162 (disclosure one week before trial too late for preparation); Thibeault, 960 F.2d at 241, 247 (thirty-seven page supplementary answer to interrogatory four days before trial unfairly prejudicial). In Ferrara & DiMercurio v. St. Paul Mercury Ins. Co., the First Circuit Court of Appeals found no prejudice when the opposing party had notice of the substitute expert three months before trial. 240 F.3d at 10. In this case, the date for trial has not been set, and it appears that [*12] the parties will not be ready to try the case until September, 2009 due to previous commitments. (See Docket No. 223, P 4) The parties will schedule this expert discovery with sufficient time to depose the new expert and incorporate his testimony. Although the Court shall prioritize trying this case ahead of more recently filed civil cases, this is not a situation where the trial date will have be to be pushed back again, inconveniencing the parties and interfering with the Court's case management. Additionally, the Court expects Dr. Keefer's testimony to be similar to that of Dr. Warner. As such, the time needed for preparation should not be excessive.

III Conditions Requested by Plaintiffs

The conditions on the motion sought by plaintiffs for granting defendant's request to substitute an expert are sanctions not merited by the circumstances. Plaintiffs request that Mr. Keefer adopt Mr. Warner's report and deposition testimony including all concessions and admissions, and that Mr. Keefer be made available at the office of plaintiffs' counsel with defendant paying for all expenses. These requests are all sanctions that may be applied under Rule 37 if the late substitution is not substantially [*13] justified or harmless. See Fed.R.Civ.P. 37(c)(1). Here, the late substitution request is substantially justified and harmless, rendering sanctions unnecessary.

Even if the untimely disclosure of a new expert witness is neither justified nor harmless, however, the Court is already sanctioning defendant by restricting Dr. Keefer's testimony to the areas covered by Dr. Warner. See Roberts ex rel. Johnson v. Galen of Va., Inc., 325 F.3d 776, 784 (6th

Cir. 2003). The conditions of plaintiff are sanctions that are not required to be imposed here.

Plaintiffs request that Mr. Keefer adopt Dr. Warner's report and deposition testimony in full, but they cite no relevant authority to support their position. In neither case cited by plaintiffs did the court require actual adoption of the prior expert's testimony; the scope of the new expert's testimony was merely limited. See Ind. Ins. Co., 2003 U.S. Dist. LEXIS 17176, 2003 WL 22244787, at *1; Manildra Milling Corp., 1991 U.S. Dist. LEXIS 14159, 1991 WL 205691, at *1. The First Circuit Court of Appeals has required limitations on the scope of a new expert's testimony introduced shortly before trial to prevent new information from surprising the opposition without requiring actual adoption of prior testimony. [*14] See Poulis-Minott, 388 F.3d at 359; Ferrara & DiMercurio, 240 F.3d at 10. Mr. Keefer should be able to proceed with his testimony as any other expert would with the caveat that he address the same subject matter as Dr. Warner without meaningful changes. Contrary to plaintiffs' allegations, the introduction of a substitute expert does not *ipso facto* permit defendant to escape from the concessions or admissions of Dr. Warner. As plaintiffs concede, they will be able to challenge Mr. Keefer's testimony with the transcript of Dr. Warner's deposition. Mr. Keefer should have the opportunity to express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform.

It is notable that plaintiffs argue for the imposition of a number of conditions on the substitution without requesting a continuance in case they do not have time to properly prepare. "Courts have looked with disfavor upon parties who claim surprise and prejudice but who do not ask for a recess so they may attempt to counter the opponent's testimony." Johnson, 775 F.2d at 8. As mentioned above, if the deposition testimony includes new subject areas, [*15] plaintiffs can move to exclude it. Additional conditions on Mr. Keefer's testimony will not be required.

Plaintiffs' other request, requiring defendant to pay plaintiffs' expenses, is an unwarranted sanction. Courts have discretion to require the violating party to pay reasonable expenses incurred in deposing new witnesses or otherwise curing discovery violations. See Radecki, 177 F.3d at 696; McNerney, 164 F.R.D at 587. In this case, defendant would be punished because of the illness and death of its critical liability expert witness if required to pay attorneys fees and other expenses. In cases awarding expenses for discovery violations, courts note they are imposing a lesser sanction because exclusion would be "too drastic a remedy," under the circumstances. McNerney, 164 F.R.D at 587. Even if expenses are a more mild sanction under Rule 37(c)(1), they are still a sanction. As discussed previously, sanctions are not necessary in this case.

Lastly, even if the Court had found sanctions were appropriate here, it would have also found the limitation on the scope of Mr. Keefer's report and testimony to be a sanction sufficient to mitigate any possible prejudice to plaintiffs. The 1993 [*16] advisory committee notes to Rule 37(c)(1) lists "preventing contradictory evidence" as a possible alternative sanction. The Sixth Circuit Court of Appeals cited this provision when it found a limitation on the scope and content of a new expert's testimony a sufficient sanction allowing for a "sensible compromise", "consonant with both the text and logic of Rule 37(c)(1)," "without unfairly surprising [plaintiffs] with unexpected new opinions." Roberts ex rel. Johnson, 325 F.3d at 784. Conveniently enough, this limitation on contradictory evidence is already required under First Circuit precedent; it has simply not been discussed as an alternative sanction. See Ferrara & DiMercurio, 240 F.3d at 10-11. Following this reasoning, no additional sanctions or limitations are necessary.

In sum, the Court finds the untimely discovery disclosures substantially justified and harmless. The Court reminds the parties, however, that the new expert shall labor under the limitations on the scope and content as required by Ferrara & DiMercurio v. St. Paul Insurance Co. The discovery violation was an isolated incident that could not have been prevented by the defendant who had no forewarning of the illness [*17] of its expert. The Court shall not sanction defendant.

Conclusion

For the foregoing reasons, the Court **GRANTS** defendant's motion for leave to substitute an expert witness without plaintiffs requested conditions. At the upcoming scheduling conference, the Court will set a trial date leaving adequate time for Mr. Keefer to prepare his report and be deposed. If the deposition transcript reveals new information outside the scope of Dr. Warner's testimony, plaintiffs can move for its exclusion accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 15, 2009.

/s/ Francisco A. Besosa

FRANCISCO A. BESOSA

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was caused to be hand delivered to Counsel for Defendant as follows: Ballard Spahr, Anthony C. Kaye and Matthew L. Moncur, 201 South Main – Suite 800, Salt Lake City, UT 84111, on this 12th day of July, 2010.

Earl S. Spafford

Tab 12

Boutwell v. SW COMMERCIAL MANAGEMENT, INC., Dist. Court, D. New Mexico 2009

LAUREL BOUTWELL, Plaintiff,
v.
SW COMMERCIAL MANAGEMENT, INC., d/b/a Foothills Shopping Center, FOOTHILLS OF ALBUQUERQUE SHOPPING CENTER ASSOCIATES, COLLIER, HAINES & ASSOCIATES, and SUNWEST N.O.P., INC., Defendants.

No. CIV 07-1103 JB/LFG.

United States District Court, D. New Mexico.

August 7, 2009.

James P. Lyle, Albuquerque, New Mexico, Attorney for the Plaintiff.

Bruce McDonald, Christian C. Doherty, Law Offices of Bruce S. McDonald, Albuquerque, New Mexico, Attorneys for Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P., **Inc.**

Ben M. Allen, Jacob A. Garrison, Hatch, Allen & Shepherd, Albuquerque, New Mexico, Attorneys for Defendants Collier, Haines and Associates and Foothills of Albuquerque Shopping Center Associates.

MEMORANDUM OPINION AND ORDER

JAMES O. BROWNING, District Judge.

THIS MATTER comes before the Court on: (i) Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Motion for Summary Judgment, filed March 27, 2009 (Doc. 62); (ii) Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Motion to Strike Affidavit and Report of Walla Engineering, and Motion to Strike Affidavit of Plaintiff Laurel **Boutwell**, Attached in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, filed May 11, 2009 (Doc. 72)("Motion to Strike"); and (iii) Defendants' Motion to Reconsider this Court's Anticipated Rulings with Respect to Defendants' Motion for Summary Judgment, Motion to Strike and First Motion in Limine, Based Upon Plaintiff's Counsel's Inaccurate Representation to the Court Requesting the Status of Michael Walla, filed June 12, 2009 (Doc. 85)("Motion to Reconsider"). The Court held hearings on June 11, 2009, and July 15, 2009. The primary issues are: (i) whether the undisputed facts show that Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P., **Inc.** ("Defendants") are not legally responsible for the collapse of the roof of a Big Lots store that injured Plaintiff Laurel **Boutwell**; (ii) whether the Court should strike a report written by Michael Walla of Walla Engineering, Ltd. addressing the collapse of the roof; and (iii) whether the Court should strike **Boutwell's** affidavit discussing who would conduct repairs of the roof. Because the Court concludes that the facts of this case are similar to the situations in which a plaintiff finds an engineering report by an in-house engineer, and do not warrant striking Walla's report or precluding **Boutwell** from calling Walla as a witness, the Court will not strike the report. Because the Court does not see a direct contradiction between **Boutwell's** affidavit and deposition testimony, the Court will also not strike the affidavit. With the affidavit and the report as part of the record before the Court, there are genuine issues of material fact, and so the Court will deny summary judgment. The Court will thus deny the Defendants' motion for summary judgment and motion to strike. The Court will grant the Defendants' motion to reconsider to the limited extent of taking into account the additional facts and argument that the Defendants present, but will ultimately not change its rulings either on the motion for summary judgment or on the motion to strike.

FACTUAL BACKGROUND

This case is a personal-injury lawsuit involving the collapse of the roof at a Big Lots store in Albuquerque, New Mexico where **Boutwell** worked. **Boutwell** alleges that the roof collapsed during a rainstorm and injured her. See First Amended Complaint for Personal Injuries ¶ 8, at 2, filed February 4, 2008 (Doc. 3)("Amended Complaint"). According to **Boutwell**, the collapse was the result of flaws in the construction of the roof. See Letter from Michael Walla to Jennifer Ashmore at 1-3 (dated August 10, 2006)(Doc. 69-3)("Walla Report"). The Defendants maintain that Big Lots' failure to conduct ordinary maintenance of the roof caused water to pool on the roof and eventually led to the collapse. See Exhibit 1 to Motion, Affidavit ¶ 3, at 1 (executed March 17, 2009)("Koontz Aff."). In addition to disputing the cause of the collapse, the parties have differing interpretations whether the Defendants are responsible for the upkeep of the roof. The sublease between Sunwest, as landlord, and PNS Stores, **Inc.**,

which operates the Big Lots store, as tenant, says that Sunwest will perform "[a]ll maintenance and all repairs . . . necessary or appropriate to keep the structure of the store watertight and in good order, condition, and repair," including maintenance of the "roof, including the roof membrane, structure and supports, such that absolute watertight conditions shall be maintained at all times during the Lease Term," and of "[t]he gutters, downspouts and roof drain system." Sublease § 10.3(a), 10.3(a)(2), 10.3(a)(4), at 35 (Doc. 69-2). The sublease also states that, after the fifth anniversary from the tenant's rent commencement date, the tenant rather than Sunwest will "perform ordinary maintenance on the roof," but that tenant will not be responsible "for the maintenance or repair of the roof structure." Id. § 10.3 (b), at 36. From the Defendants' view, the sublease makes Big Lots the party responsible for the relevant roof care in this case. **Boutwell** asserts that, when roof repairs were needed or when there were drainage issues, Big Lots contacted Sunwest, who would send out roofers to perform any necessary work. See Affidavit of Laurel **Boutwell** ¶ 3, at 1 (Doc. 69-4) ("**Boutwell** Aff."). The Defendants counter that **Boutwell** has testified, however, that she did not know who was doing work on the roof of the store. See Deposition of Laurel Yvonne **Boutwell** at 95:1-96:11 (Doc. 72-2)("**Boutwell** Depo ")

PROCEDURAL BACKGROUND

The Defendants move for summary judgment on the sole claim against them, which is for negligence. The Defendants contend that the collapse of the roof was the result of Big Lots' failure to adequately maintain the roof pursuant to the sublease and thus they do not owe **Boutwell** any duty that they could have breached. See Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Memorandum in Support of Motion for Summary Judgment at 4, filed March 27, 2009 (Doc. 63)("MSJ"). To support this proposition, the Defendants cite the expert report of Jim Koontz, which opines that the roof collapsed because of uncleared debris clogging the roof's drainage, which caused water to pool on the roof and ultimately triggered the collapse. See id. According to the Defendants, even if they breached a duty to **Boutwell** to repair prior leaks or replace the roof, any such breach was not the cause of the collapse. See id. at 4-5.

Boutwell counters that the Defendants' argument is at odds with their theory in an earlier case stemming from the same incident — Foothills of Albuquerque Shopping Center Associates vs. Sunwest N.O.P., **Inc.**, Case No. CIV 07-0145 JC/ACT (D.N.M.). See Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment (Docket No. 62) at 2, filed April 27, 2009 (Doc. 69)("MSJ Response"). According to **Boutwell**, the Defendants' expert from that earlier case, Walla, had concluded that the roof collapse was caused by the roof's substandard construction and deficient repairs after an earlier collapse, and **Boutwell** contends the Defendants are responsible for both the construction and the repair under the sublease. See id. at 5. In addition, **Boutwell** contends that the Defendants were responsible for maintaining the roof under New Mexico law and under the sublease, and that this obligation was never delegated to Big Lots. See id. at 5-6.

Boutwell's response prompted the Defendants to move to strike Walla's expert report and **Boutwell's** affidavit. Regarding Walla, the Defendants contend that none of the parties have designated, retained, or disclosed Walla as an expert in this case. See Motion to Strike at 2-4. With respect to **Boutwell's** affidavit, the Defendants contend that she does not address the key issues and that her deposition testimony contradicts her assertion of personal knowledge regarding repairs. See id. at 4-6. Contemporaneous with the motion to strike, the Defendants filed their reply supporting their motion for summary judgment and contend that, without Walla's report or **Boutwell's** affidavit, there is no genuine issue of material fact, and that, moreover, New Mexico law does not prevent the Defendants from delegating their duties pursuant to a sublease. See Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Reply in Support of Defendants' Motion for Summary Judgment at 2-4, filed March 27, 2009 (Doc. 62).

In response to the motion to strike, **Boutwell** contends that Walla's report was part of the Defendants' initial disclosures. See Response to Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Motion to Strike Affidavit and Report of Walla Engineering, and Motion to Strike Affidavit of Plaintiff Laurel **Boutwell**, Attached in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment (Docket No. 72) at 2, filed May 18, 2009 (Doc. 77)("Response to Motion to Strike"). **Boutwell** maintains that, because she stated in the Joint Status Report that she may call any witness the Defendants identified, she has given the required notice. See Response to Motion to Strike at 2. Additionally, **Boutwell** asserts that there is no inconsistency between her affidavit and her deposition testimony. See id. at 3.

In reply, the Defendants first contend that their identification of Walla as a prior expert witness does not equal their disclosing their intent to call Walla as a witness. See Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Reply in Support of Motion to Strike Affidavit and Report of Walla Engineering, and Motion to Strike Affidavit of Plaintiff Laurel **Boutwell**, Attached in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment at 2, filed June 1, 2009 (Doc. 78). The Defendants argue that **Boutwell** was still obligated to identify and disclose Walla as an expert. See id. at 2-4. Finally, the Defendants maintain that, despite **Boutwell's** protests to the contrary, her affidavit and her deposition materially conflict. See id. at 4.

On June 11, 2009, the Court held a hearing on the motion for summary judgment and the motion to strike. At that hearing, Christian Doherty, counsel for the Defendants, stated that, although he was not the attorney during the earlier litigation, his understanding of events was that Walla was retained and his report disclosed, but was never deposed and never testified. See Transcript of Hearing at 4:17-5:11(taken June 11, 2009, filed June 30, 2009)(Doc. 88)

("June Tr ")(Doherty & Court) Mr Doherty conceded that if the Defendants were allowed to depose Walla that would mitigate some of the prejudice from **Boutwell's** reliance on Walla, but maintained that they had complied with the deadlines and that another extension would push back the trial once more See id at 10 21-11 8 (Court & Doherty) The Court asked Mr Doherty whether Walla's investigation might be an admission or a matter for fact testimony that Walla could give, and Mr Doherty asserted that Walla's only relevance to this case was for his opinions See id at 11 13-12 16, 14 21-15 11 Mr Doherty conceded that his motion for summary judgment was dependent upon the motion to strike See id at 35 15-36 1 The Court informed the parties that it was inclined to deny the motions on the grounds that Walla's report was likely analogous to an admission usable against the Defendants See id at 40 18-41 6 (Court)

After the hearing, the Defendants filed their motion to reconsider The Defendants stated that they had erroneously stated that Walla was retained in the earlier litigation See Motion to Reconsider at 2 According to the Defendants Walla's report pre-dated the filing of Foothills of Albuquerque Shopping Center Associates vs Sunwest N O P , **Inc** , and was never disclosed in that case, and thus the Defendants never ratified that report in a way that would make it an admission See Motion to Reconsider at 2

Boutwell responded that the motion to reconsider was, in effect, a surreply in disguise filed in violation of local rules, and that Walla was retained to investigate the collapse and his opinions were reliable testimony which the Court could admit despite not being disclosed under rule 26 See Response to Defendants' Motion to Reconsider this Court's Anticipated Rulings with Respect to Defendants' Motion for Summary Judgment, Motion to Strike and First Motion in Limine, Based Upon Plaintiff's Counsel's Inaccurate Representation to the Court Requesting the Status of Michael Walla at 1-2, filed June 25, 2009 (Doc 87) The Defendants argue in reply that they were not aware that **Boutwell** was incorrect about Walla having been retained earlier as a rule 26 expert and the Defendants should be allowed to correct the factual error See Defendants **SW Commercial Management Inc** and Sunwest, N O P **Inc** 's Reply in Support of Defendants' Motion to Reconsider this Court's Anticipated Rulings with Respect to Defendants' Motion for Summary Judgment Motion to Strike and First Motion in Limine, Based Upon Plaintiff's Counsel's Inaccurate Representation to the Court Requesting the Status of Michael Walla at 1-2, filed July 9, 2009 (Doc 90) Additionally, the Defendants contend that **Boutwell's** response misses the point — that while Walla may have conducted an investigation, Walla was not retained as a rule 26 expert in the earlier case See id at 2-3

The Court then held a hearing on the motion to reconsider on July 15, 2009 Mr Doherty stated that, from what he was able to determine, Walla may have done work on behalf of an insurance company, but was not named by any party in the earlier case as an expert See Transcript of Hearing at 5 3-6 17 (Doherty & Court)(taken July 15, 2009)("July Tr ") [1] Mr Doherty stated that he believed that Walla's report was produced in this case because it was part of the files regarding the incident that the Defendants had and because he believed it needed to be disclosed See id at 7 15-25 (Doherty) James P Lyle, **Boutwell's** attorney, stated that his investigation turned up that Walla had produced a report for Sunwest, but was not named as an expert by any party, though he was named as a witness by a third-party defendant See id at 12 11-19 (Lyle) Mr Lyle contended that Walla should be treated similarly to a treated physician and allowed to testify See id at 13 20-14 14 (Lyle & Court) The Court informed the parties that, with the new information, it did not appear that the Defendants could be said to have adopted Walla's report, but that Walla may have been an agent acting in the scope of his agency See id at 16 21-17 18 (Court)

ANALYSIS

Several of the motions pending before the Court are interconnected, and the Court will consolidate those motions in this opinion The Defendants' motions for summary judgment, to strike, and for reconsideration all ultimately turn upon whether the Court allows **Boutwell** to use Walla's report or to call him to testify Because the circumstances here are similar to those in which a plaintiff discovers an engineering report in the defendant s files written by one of the defendant's employee engineers, and do not justify precluding **Boutwell** from relying on Walla, the Court will not strike Walla's report Additionally, the Court will not strike **Boutwell's** affidavit With both those documents before the Court, summary judgment, as the Defendants concede, is not appropriate

I. THE COURT WILL NOT STRIKE WALLA'S REPORT.

Before turning to any other issues, the Court will decide whether to allow **Boutwell** to use Walla's report or to call Walla as a witness at trial This issue is the central issue underlying the various motions before the Court in this opinion It is also an unusual issue that does not fit neatly within the confines of any particular rule Taking guidance from several areas of law, the Court concludes that the most appropriate course here is to allow **Boutwell** to rely on Walla, but to carefully confine the extent of any testimony at trial

As a starting point, the Court notes that the evidence Walla could provide and that his report provides are relevant to the issues in this case His opinions and observations concern the collapse that is the primary issue here The burden is on the Defendants to demonstrate why the Court should not consider the evidence

As the Court discussed at the second hearing, the situation is at least somewhat analogous to the situations that rule 801(d)(2)(D) of the Federal Rules of Evidence addresses. That rule makes "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," not hearsay. Fed. R. Evid. 801(d)(2)(D). While the question here is not one of hearsay as such, that evidence rules contemplate allowing, as admissions, out-of-court statements by a party's agents suggests that courts should generally allow such evidence. And, if the rule applies, it also deprives the Defendants of the ability to argue that Walla's report would be hearsay, although that is not a defense they have raised at this time.

Walla's letter is addressed to Jennifer Ashmore, who is identified in the letter as connected with Sunwest and whom Mr. Lyle represented is a principal of Sunwest. See Walla Report at 1. Walla writes that "[i]n accordance with our agreement with Sunwest we have completed a structural evaluation of the above referenced structure." Id. The "above referenced structure" is the "Big Lots Retail Store Roof Failure, Albuquerque, New Mexico." Id. Based upon this language, Walla's report appears to have been conducted at one of the Defendants' request and to be within the scope of their agreement. Thus, from the record before the Court, rule 801(d)(2)(D) would apply.

One wrinkle in this result might be that Walla would be considered a non-testifying or consulting expert. "Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Fed. R. Civ. P. 26(b)(4)(B). It is not clear that Walla, who was retained before the earlier lawsuit was filed, was necessarily retained in anticipation of litigation, although that is not unlikely. In any event, the information that **Boutwell** wants to use has been disclosed. The disclosure has waived any assertion that Walla or his work would be non-discoverable or perhaps protected by the work-product privilege. The disclosure was not inadvertent, rather the Defendants state they thought it was a required disclosure. See July Tr. at 7:15-25 (Doherty)(discussing why report was disclosed); Employer's Reinsurance Corp. v. Clarendon Nat. Ins. Co., 213 F.R.D. 422, 427 (D. Kan. 2003)(declining to find automatic waiver for inadvertent disclosures); Atari Corp v Sega of America, 161 F.R.D. 417, 420 (N.D. Cal. 1994)(holding that voluntary discovery waived rule 26(b)(4)(B) protection). If the Defendants had not produced the report, then **Boutwell's** attempt to get the report or to use Walla might violate the Federal Rules of Civil Procedure, see Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984)(holding that trial court was justified in excluding the expert that the defendants retained after the plaintiffs retained the expert as a consultant, but declined to call the expert as a witness and did not reveal the substances of his opinions in discovery),[2] but **Boutwell** is doing nothing more than trying to use what the Defendants have handed her. Moreover, whatever Walla's status in the earlier litigation, he is not consulting or testifying for the Defendants in this case.[3]

The Defendants' chief defense, however, is the more routine defense that **Boutwell** did not properly disclose Walla to them as an expert under the Federal Rules of Civil Procedure. Rule 26(a)(2)(A) states that "a party must disclose to the other parties the identity of any witness it may use at trial to present" expert evidence. Furthermore, "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony," then "this disclosure must be accompanied by a written report." Fed. R. Civ. P. 26(a)(2)(B). **Boutwell** argues that she gave sufficient notice in the Joint Status Report.

In the Joint Status Report, **Boutwell** identifies as a witness "[a]ny witnesses identified by the Defendants or during discovery." Joint Status Report and Provisional Discovery Plan ¶ 12, at 6, filed September 19, 2008 (Doc. 14). Walla's identity and his report were disclosed to **Boutwell** during the course of discovery. As a general matter, Walla would thus fall within the scope of this disclosure. It is not clear to the Court, however, whether the materials revealed during discovery would satisfy all the requirements of an expert report under rule 26(a)(2)(B). **Boutwell**, however, is not retaining Walla, so much as pointing out what Walla has said that is already a part of the record. **Boutwell** did not ask Walla to undertake any investigation and to offer any opinions. Instead, Walla came to his opinions earlier, at Sunwest's behest, and **Boutwell** seeks to use those opinions — which are now historical facts — that have been disclosed to her. Under this situation, the Court cannot say that **Boutwell** has failed to comply with rule 26.

The situation is somewhat analogous, as **Boutwell** contends, to that of a treating physician. Treating physicians are not required to issue expert reports because they are not retained experts, even though they give expert opinions that they form earlier and that are now historical facts. See Watson v. United States, 485 F.3d 1100, 1107 (10th Cir. 2008). On the other hand, treating physicians must limit their testimony to opinions and conclusions drawn earlier from prior examination and treatment of their patients. See Sturgeon v. ABF Freight Systems, Inc., No. CIV 02-1317 JB/WDS, Memorandum Opinion and Order at 3-4, entered January 14, 2004 (Doc. 121)(Browning, J.). Similarly, **Boutwell** is not seeking to retain Walla to investigate and offer opinions on the collapse in the manner of a traditional expert, but rather attempting to use Walla's previously prepared report, and call Walla as a witness to testify about what he observed and the conclusions he reached in the past, during his pre-trial investigation. What **Boutwell** is seeking to accomplish is analogous to how courts handle the testimony of treating physicians and this similarity is another reason that an expert report is not necessary, as well as a further reason why allowing the testimony and the report are appropriate more generally.

In sum, the Court does not see any sound reason, based on the rules of procedure or evidence, or otherwise, to preclude **Boutwell** from relying on Walla's report or from calling

Walla to testify about his observations and about the conclusions drawn from them. Like a treating physician, however, Walla's opinion testimony will be limited to those opinions from his earlier investigation into the collapse. The situation here is similar to a plaintiff finding an internal report from the defendant's file written by the defendant's in-house employee, and while the Court does not see a sound reason to exclude Walla or his report, the Court also believes that **Boutwell's** adherence to rule 26 was required, and while the Joint Status Report generally described any witnesses whom the Defendants in the upcoming discovery might disclose, the Court believes that the Defendants may have been reasonably surprised at **Boutwell's** reliance on Walla's earlier report. Walla has not been deposed, and on the facts of this case, the Court cannot fault the Defendants for that oversight. If the Defendants wish to depose Walla, the Court will allow it, even though discovery is now closed, and while the Court encourages the parties to resolve this scheduling without the need for changing deadlines, given the nearness of the trial, the Court may look favorably on continuing the trial if necessary to having Walla deposed before trial.

II. THE COURT WILL NOT STRIKE BOUTWELL'S AFFIDAVIT.

The Defendants ask that the Court strike **Boutwell's** affidavit because it allegedly conflicts with her testimony during her deposition. The Defendants contend that **Boutwell's** conflicting testimony is an impermissible attempt to create a phantom or manufactured issue of material fact that precludes the Court from granting summary judgment. See, e.g., Leon v. Kelly, 2008 WL 5978926 at *2, *4 (D.N.M.)(Browning, J.)(denying request to strike affidavit, because, among other reasons, there was insufficient inconsistency between affidavit and admission). In her affidavit, **Boutwell** asserts that, from her experience as an assistant manager at Big Lots, she knew that Big Lots would contact Sunwest, the landlord, who would send "independent roofing repair people who would perform the necessary work on the roof." **Boutwell** Aff. ¶ 3, at 1. At her deposition, however, **Boutwell** was asked about patching that was done on the roof, and **Boutwell** stated that, while the workers who did the repairs were not Big Lots employees, she did not remember the name of the company doing repairs, and did not know who hired or paid the workers. See **Boutwell** Depo. at 95:17-96:11. While there is tension between the affidavit and the deposition, the Court does not see the direct contradiction or inconsistency that might justify striking the affidavit. The tension is more a matter of conflicting inferences than direct inconsistency. On summary judgment, **Boutwell**, as the non-moving party, is entitled to have all the reasonable favors drawn in her favor. See Moore v. Guthrie, 438 F.3d 1036, 1039 (10th Cir. 2006). The deposition indicates that, on at least one specific incident, **Boutwell** did not know who hired the workers doing repairs, but her affidavit speaks more generally that, as a matter of course, Big Lots would contact Sunwest, who would send out repair people. Both statements may be true. On one occasion, **Boutwell** may have been unaware of who hired workers, while as a general matter, she may know that Big Lots would call Sunwest to have roof work done. Without a more direct conflict, the Court will not strike the affidavit.

III. THE COURT WILL DENY SUMMARY JUDGMENT.

The Defendants concede that their motion for summary judgment cannot succeed if the Court admits Walla's report. See June Tr. at 35:15-36:1 (Doherty & Court). Walla's report contradicts Koontz' report regarding the cause of the collapse. While Koontz asserts that the cause of the collapse was Big Lots' failure to conduct ordinary maintenance of the roof, see Koontz Aff. ¶ 3, at 1, Walla asserts that the collapse was the result of flaws in the construction of the roof, see Walla Report at 1-3. If Walla was correct, then the Defendants would bear responsibility for the collapse. Moreover, **Boutwell's** affidavit creates a genuine issue of material fact about the course of dealing under the sublease regarding which party was responsible for particulars repairs and maintenance on the roof. See Wheeler Peak, LLC v. L.C.I.2, **Inc.**, 2009 WL 1329115 at *7 (D.N.M.)(Browning, J.)(stating that course of performance may be used in interpreting the terms of a contract under New Mexico law) (citing McNeill v. Rice Engineering and Operating, **Inc.** ¶ 14, 133 N.M. 804, 808-09, 70 P.3d 794, 798-99 (Ct. App. 2003)). Given the Defendants' concession and the state of the record, summary judgment is inappropriate.

IT IS ORDERED that Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Motion for Summary Judgment is denied; Defendants **SW Commercial Management, Inc.** and Sunwest, N.O.P. **Inc.**'s Motion to Strike Affidavit and Report of Walla Engineering, and Motion to Strike Affidavit of Plaintiff Laurel **Boutwell**, Attached in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment is denied; and Defendants' Motion to Reconsider this Court's Anticipated Rulings with Respect to Defendants' Motion for Summary Judgment, Motion to Strike and First Motion in Limine, Based Upon Plaintiff's Counsel's Inaccurate Representation to the Court Requesting the Status of Michael Walla is granted to the extent that the Court will take the Defendants' additional arguments into account, but is otherwise denied.

[1] The Court's citations to the transcript of the hearing refer to the court reporter's original, unedited version. Any final transcript may contain different page and/or line numbers.

[2] It may be that, to form the most informed opinion on the cause of the collapse, the expert should be one that examined the roof shortly after the collapse, which could narrow the field of potential experts to those involved in the earlier litigation. This possibility could allow for an exception to the rule for "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Ager v. Jane C. Stormont Hospital and Training School for Nurses, 622 F.2d 496, 503 (10th Cir. 1980)(internal quotation marks omitted). Because discovery is not at issue here, the Court need not decide whether report should have been produced or whether Court could have compelled production.